DOCKET

No. 86-1172-ASX
Status: GRANTED

Title: Goodyear Atomic Corporation, Appellant
v.
Esto Miller and Industrial Commission of Ohio

Docketed:
January 16, 1987

Court: Supreme Court of Ohio

Counsel for appellant: Tait,Robert E.

Counsel for appellee: Jaffy,Stewart R., Ninos,Helen M.

Entry	Date	Note	Proceedings and Orders
1	Nov 7 1986		Application for extension of time to docket appeal and order granting same until January 17, 1987 (Scalia, November 10, 1986).
2	Jan 16 1987	G	Statement as to jurisdiction filed.
4	Feb 12 1987		Order extending time to file response to jurisdictional statement until March 16, 1987.
5	Mar 11 1987		Brief of appellees Esto Miller, et al. in opposition filed.
6	Mar 18 1987		DISTRIBUTED. April 3, 1987
7	Apr 6 1987	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
8	Jun 1 1987	X	Brief amicus curiae of United States filed.
9	Jun 2 1987		REDISTRIBUTED. June 18, 1987
10	Jun 15 1987	X	Supplemental brief of appellees Esto Miller, et al. filed.
11	Jun 22 1987		PROBABLE JURISDICTION NOTED.
			**********
13	Jul 27 1987		Order extending time to file brief of appellant on the merits until September 3, 1987.
14	Sep 3 1987		Joint appendix filed.
15	Sep 3 1987		Brief of appellant Goodyear Atomic Corp. filed.
16	Sep 3 1987		Brief amicus curiae of United States filed.
17	Sep 10 1987	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Sep 18 1987		Order extending time to file brief of appellee on the merits until November 4, 1987.
20	Sep 26 1987	D	Motion of appellees for divided argument filed.
21	Oct 5 1987		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
22	Oct 13 1987		Motion of appellees for divided argument DENIED.
23	Nov 4 1987		Brief of appellee Esto Miller filed.
24	Nov 4 1987		Brief of appellee Industrial Commission of Ohio filed.
25	Nov 4 1987		Brief amici curiae of National Conference of State Legislatures, et al. filed.
26	Nov 4 1987	G	Motion of Oil, Chemical and Atomic Workers International Union for leave to file a brief as amicus curiae filed.
27	Nov 16 1987		Motion of Oil, Chemical and Atomic Workers International Union for leave to file a brief as amicus curiae GRANTED.
28	Nov 23 1987		SET FOR ARGUMENT. Tuesday, January 19, 1988. (2nd case).
29	Dec 14 1987		CIRCULATED.

No. 86-1172-ASX

Entry	Date	Note	Proceedings and Orders
30	Jan 8 1988	X	Reply brief of appellant Goodyear Atomic Corp. filed.
31	Jan 19 1988		ARGUED.

JURISDICTIONAL

STATEMENT

86 - 1172

No.

Supreme Court, U.S.
FILED
JAN 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GOODYEAR ATOMIC CORPORATION,

Appellant,

v.

STATE EX REL. ESTO MILLER,

Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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January 17, 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

A. Whether nuclear production facilities owned, controlled, and regulated by the United States pursuant to the Atomic Energy Act of 1954, as amended, are exempt from state occupational safety and health regulation under the Supremacy Clause of the Constitution of the United States.

B. Whether the Atomic Energy Act of 1954, as amended, and the regulations promulgated thereunder, preempt the State of Ohio from imposing state occupational safety and health standards upon a nuclear production and utilization facility owned and regulated by the United States.

LIST OF PARTIES

The parties to the proceedings below were the Goodyear Atomic Corporation, Appellant herein, Esto R. Miller, the Industrial Commission of Ohio, and the Administrator of the Ohio Bureau of Worker's Compensation.

Appellant is a wholly owned subsidiary of The Goodyear Tire & Rubber Company.[1] It has no subsidiaries that are not wholly owned. Appellant's affiliated entities are listed below.[2]

[1] Brad Ragan, Inc.
Cambridge Tire Co. of Braintree, Inc.
Celercor Investments
Celeron Corporation
Celeron Pipeline Company
Cosmoflex, Inc.
D.C.H., Inc.
Goodyear Blimp Europa, Inc.
Goodyear Corporation
Goodyear Farms, Inc.
Goodyear Financial Corporation
Goodyear Footwear Corporation
Goodyear Golf & Country Club, Inc.
Goodyear International Corporation
Goodyear International Export Corporation
Goodyear International Finance Corporation
Goodyear Nuclear Investment Company
Goodyear Properties
Goodyear Rubber Insulating Company
Goodyear Rubber Plantations Company
Goodyear Tire & Rubber Company Fund
Goodyear Ventures
Goodyear Western Hemisphere Corporation
Hose Couplings Manufacturing, Inc.
Kelly-Springfield Tire Company, The
Lee Tire & Rubber Company
Litchfield Park Properties, Inc.
Long Mile Rubber Company of Pennsylvania
MIN Tire Equipment Inc.
Tire Equipment Inc.
Motor Wheel Corporation
Retread Systems Inc.
Reneer Films Corporation
Rubber City Capital Corporation
Western States Tires and Auto Service, Inc.
WFT Inc.
Wingfoot Corporation
Wingfoot Films Corporation
Goodyear Canada, Inc.
Goodyear de Chile S.A.I.C.

Goodyear de Colombia S.A.
Kelly-Springfield Tyre Co. Ltd.)
Goodyear Industrial Rubber Products Limited
Compagnia Francaise Goodyear
Deutsche Goodyear Gesellschaft mit beschraenkter Haftung
Goodyear Hellas S.A.I.C.
Plantaciones de Hule Goodyear, Sociedad Anonima
Gran Industria De Neumaticos Centroamericana S.A.
Goodyear India Limited
Plantations Company Ltd.
Good Belt Iran
Goodyear Italiana S.p.A.
Servicar S.p.A.
Goodyear Jamaica Limited
Nippon Goodyear Kabushiki Kaisha
Toyobo Petcord Co., Ltd.
Goodyear, S.A.
Goodyear Malaysia Berhad
Compania Hulera Goodyear-Oxo, S.A.
Goodyear Tire & Rubber Company of Mexico, S.A., The
Goodyear Maroc
Goodyear Overseas Finance, N.V.
Goodyear (Nederland) B.V.
Goodyear New Zealand Limited
Goodyear Bendel Rubber Processing Company (Nigeria) Limited
Goodyear de Panama, S.A.
Goodyear Export, S.A.
Compania Goodyear del Peru S.A.
Philippine Rubber Project Company Inc.
Goodyear Portuguesa, Lda
Goodyear Orient Company (Private) Limited
Goodyear Singapore Private Limited
Goodyear Tyre & Rubber Company (S.A.) (Proprietary) Limited, The
Kelly-Springfield Tyre Co. S.A. (Pty) Limited
Compania Espanola de Neumaticos Y Caucho Goodyear (SA)
Svenska Goodyear Aktiebolag
Kelly-Springfield Gummi Aktiebolag
Goodyear (Suisse) S.A.
Goodyear Taiwan Limited

Goodyear (Thailand) Limited
Goodyear Lastikleri Turk Anonim
Goodyear Zaire S.A.R.L.
Goodyear Zimbabwe (Private) Ltd.
Wingfoot Finance Company Limited
Granford Manufacturing, Inc.
Nippon Giant Tire Co., Ltd.
Goodyear Export Sales Corporation

[2] Subsequent to the initiation of this action, Appellant's contract with the United States Department of Energy was assumed by Martin-Marietta Energy Systems, Inc. (Martin-Marietta). Martin-Marietta's affiliates are listed below:

Aminsa (Aditinosy Minerales S.A)
Atlantic Granite Co.
BOCEP Properties
BOCEP Venturers
Concrete Supply Company
EO Systems Holdings Corporation
EO Systems International Ltd.
Export Products Foreign Sales Corp.
Fry Sales and Equipment Co.
Gamma Monolithics, Inc.
International Light Metals Corporation
International Light Metals Sales Corporation
MDTT, Inc.
ML Holding Corp.
Molecular Genetics
Native Plants, Inc.
Malcom Stone Company
Manley Sand Corporation
Marietta Facilities, Inc.
Marietta Resources International Ltd.
Martek Corporation
Martin Company, The
Martin Marietta Aluminum Properties, Inc.
Martin Marietta Carbon Inc.
Martin Marietta Canada Ltd.
Martin Marietta Communications Systems, Inc.
Hoskyns Group Limited

Hoskyns Limited
Hoskyns Data Centres Limited
Hoskyns Group (NZ) Ltd.
John Hoskyns & Company Limited
Hoskyns Systems Centre Limited
Hoskyns Systems Development Limited
Hoskyns Systems (Far East) Limited
Hoskyns Systems Limited
Hoskyns Systems Research Limited
Martin Marietta, Ltd.
Martin Marietta International, Inc.
Martin Marietta Investments Inc.
Chesapeake Park, Inc.
Equatorial Communications Co.
Martin Orlando East Properties, Inc.
Martin Orlando Properties, Inc.
Orlando Central Park, Inc.
Verdix Corporation
Martin Marietta Measurements Systems, Inc.
Martin Marietta Ordinance Systems, Inc.
Martin Marietta Overseas Corporation
Martin Metals Company
Martin Marietta Information Technology, Inc.
Intelligent Systems Co., Inc.
Mathematics International, Inc.
Worldwide Software Associates, Inc.
Maxim Group Incorporated
Maxima Corporation
Microelectronics & Computer Technology Corp.
PGM Systems, Limited
R & T Trucks Inc.
Rockton & Rion Railway
SARCA (Suramericana De Refractorios C.A.)
Software Production Consortium
Standard Lime and Cement Company
Standard Magnesia Limited
Superior Stone Company
Tennessee Innovation Center, Inc.
Torrance Advanced Metals Corporation
Weaver Construction Company

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	viii
JURISDICTIONAL STATEMENT	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
HOW THE FEDERAL QUESTION WAS RAISED	5
STATEMENT OF THE CASE	6
THE QUESTIONS ARE SUBSTANTIAL	9
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

CASES: Page

California ex rel. State Water Resources Control Board v. Environmental Protection Agency, 511 F.2d 963 (9th Cir. 1975), *rev'd on other grounds*, 426 U.S. 200 (1976) 11

Campbell v. Hussey, 368 U.S. 297 (1961) 14

Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary, 683 F.2d 1171 (8th Cir. 1982) 11

Citizens for a Better Henderson v. Hodel, 768 F.2d 1051 (9th Cir. 1985) 11

Cohen v. California, 403 U.S. 15 (1971) 2

Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981) 11

County of Suffolk v. Long Island Lighting Co., 728 F.2d 52 (2d Cir. 1984) 15

Don't Tear It Down, Inc. v. Pennsylvania Avenue Devel. Corp., 642 F.2d 527 (D.C. Cir. 1980) 11

Environmental Protection Agency v. California ex rel. State Water Resources Control Board, 426 U.S. 200 (1976) 11

Hancock v. Train, 426 U.S. 167 (1976) 10,13

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 2

Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954) 11

Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956) 12

McCulloch v. Maryland, 4 Wheat. 316 (1819) 11

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 2

Minnesota v. Hoffman, 543 F.2d 1198 (8th Cir. 1976), *cert. denied and app. dismissed*, 430 U.S. 977 (1977) 11

Table of Authorities Continued

Page

Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972) 15

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983) 14,15,16,17

Paul v. United States, 371 U.S. 245 (1963) 11

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 15

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 18-19

Xerox Corp. v. County of Harris, Texa, 459 U.S. 145 (1982) 2

CONSTITUTIONAL PROVISIONS:

United States Constitution Art. VI, p. 2 2,10

Ohio Constitution Art. II, §35 2,9

STATUTES:

29 U.S.C. §653(b)(1) 3,17

42 U.S.C. §2021(k) 17

42 U.S.C. §2061 3,7,14,15,17

42 U.S.C. §2201 3,14,15,17

42 U.S.C. §5812 4

42 U.S.C. §7151(a) 4

Ohio Revised Code §4121.47 4-5

JURISDICTIONAL STATEMENT

Appellant, Goodyear Atomic Corporation, appeals from the final judgment of the Supreme Court of Ohio holding that the Supremacy Clause of the Constitution of the United States and the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011 *et seq.*, do not preempt the Industrial Commission of Ohio from applying Ohio's specific safety requirements to the Portsmouth Gaseous Diffusion Plant, a federal nuclear production and utilization facility regulated and controlled by the United States through its Department of Energy, and managed under contract by Appellant.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, which appears in the appendix hereto, 1a, *infra*, is reported at 26 Ohio St. 3d 110, 497 N.E.2d 76 (1986). The opinion of the Franklin County Court of Appeals, dated July 25, 1985, was not reported and is reprinted in the appendix hereto at 9a, *infra*. The order and finding of the Industrial Commission of Ohio, dated March 8, 1983, and the Commission's denial of a motion for rehearing, were not reported and are reprinted in the appendix hereto at 15a and 18a, *infra*.

JURISDICTION

The final judgment of the Supreme Court of Ohio, affirming the Franklin County Court of Appeals' issuance of a writ of mandamus to the Industrial Commission of Ohio, was entered on August 20, 1986. Notices of appeal to this Court were timely filed in the Supreme Court of Ohio, and in the Franklin

County Court of Appeals, which possesses the record in this case, on October 27, 1986.

This appeal is being docketed in this Court within one hundred and fifty (150) days of the entry of final judgment by the Supreme Court of Ohio, a motion for extension of time being granted by this Court on November 10, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2).[3]

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, paragraph two, United States Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article II, Section 35 of the Ohio Constitution:

Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the em-

[3] That it was arguably the "application" of state requirements to federal facilities, rather than the "validity" of the state regulatory scheme, which was specifically called into question in this case, does not alter the right to an appeal under 28 U.S.C. § 1257(2). As this Court noted in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 441 (1979), "a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." *See also Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985); *Xerox Corp. v. County of Harris, Texas*, 459 U.S. 145 (1982); *Cohen v. California*, 403 U.S. 15, 17-18 (1971).

ployer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final.

United States Code Title 29, Section 653(b)(1):

(N)othing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

United States Code Title 42, Section 2061:

(a) The Commission, as agent of and on behalf of the United States shall be the exclusive owner of all production facilities . . . .

(b) To the extent deemed necessary the Commission is authorized to make contracts with persons obligating them to produce special nuclear material in facilities owned by the Commission. Any contract entered into under this Section shall contain provisions . . . obligating the contractor to comply with all safety and security regulations which may be prescribed by the Commission.

United States Code Title 42, Section 2201:

In the performance of its functions the Commission is authorized to—

(e) acquire such material, property, equipment, and facilities, establish or construct such buildings and facilities, and modify such buildings and facilities from time to time, as it may deem necessary . . .

* * *

(i) prescribe such regulations or orders as it may

deem necessary . . . (3) to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property; . . . .

United States Code Title 42, Section 5812:

There shall be at the head of the Administration an Administrator of Energy Research and Development . . . .

* * *

There shall be in the Administration six Assistant Administrators, one of whom shall be responsible for fossil energy . . . another for environment and safety . . . .

United States Code Title 42, Section 7151(a):

(E)xcept as otherwise provided in this Act, there are hereby transferred to, and vested in, the Secretary all of the functions vested by law in the . . . Administrator of the Energy Research and Development Administration or the Energy Research and Development Administration; and the functions vested by law in the officers and components of . . . such Administration.

Ohio Revised Code, Section 4121.47:

(A) No employer shall violate a specific safety rule of the Industrial Commission or act of the General Assembly adopted pursuant to Section 4121.13 or 4121.131 of the Revised Code.

(B) Where the Commission, in the course of its determination of a claim for an additional award under Section 35 of Article II, Ohio Constitution, finds the employer guilty of violating Division (A) of this Section, it shall, in addition to any award paid to the claimant, issue an order to correct the violation within such period of time as the Commission fixes. For any violation occurring within twenty-four months of the last violation, the Commission shall assess against the employer a civil penalty in an amount the Commission determines up to a maximum of fifty thousand dollars for each violation. In fixing the exact penalty, the Commission shall base its decision upon the size of the employer as measured by the number of employees, assets, and earnings of the employer.

HOW THE FEDERAL QUESTION WAS RAISED

At the earliest stage of proceedings before the Industrial Commission of Ohio (Commission), Appellant moved to dismiss Esto Miller's (Miller) application for an additional award for Violation of a Specific Safety Requirement (VSSR) on the ground that, under the Constitution and Laws of the United States, the Commission lacked jurisdiction to enforce Ohio's safety requirements at the involved federal facility. The Commission accepted this argument. *See* appendix 15a, *infra*.

When Miller sought a writ of mandamus from the Franklin County Court of Appeals ordering the Commission to consider his application, Appellant likewise interposed defenses based upon the Supremacy Clause of the United States Constitution. Although the Court of Appeals expressly recognized as a matter of Ohio law that the Ohio VSSR scheme was clearly regulatory in nature, it nevertheless rejected Appellant's

Constitutional arguments and granted the writ of mandamus. *See* appendix 9a, *infra*.

On appeal to the Supreme Court of Ohio, Appellant once again argued that the Supremacy Clause of the Constitution, coupled with the applicable provisions of the Atomic Energy Act of 1954, as amended, prohibited application of Ohio safety standards to the federally owned nuclear production facility. Nevertheless, the majority found no such preemption and affirmed the Court of Appeals' judgment. The dissent, on the other hand, recognized that, absent express Congressional authorization for such state regulation, imposition of the Ohio safety requirements at the federal facility was "constitutionally and statutorily impermissible." *See* appendix 8a, *infra*.

STATEMENT OF THE CASE

Under provisions of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011 *et seq.* (the "Act"), the United States Department of Energy ("DOE") is charged with exclusive responsibility for ownership and operation of all nuclear production facilities located in the United States. One of those facilities is the Portsmouth Gaseous Diffusion Plant located near Piketon, Ohio ("Piketon plant"). That plant enriches and refines fuel materials to assays which can be used for civilian energy and national defense purposes and is the only currently operating facility in the United States capable of enriching uranium to the assay which is required by the United States Navy to power its nuclear ships and submarines and for nuclear weapons. Information relating to the design and technology utilized at the facility is highly classified and access to the facility is severely restricted.

The federal statutory scheme providing for exclusive DOE ownership and control of nuclear production facilities is wholly separate and distinct from the authority granted the Nuclear Regulatory Commission ("NRC") to supervise the operation of nuclear power plants. Such plants, of which there are over one hundred nationwide, are neither owned nor operated by DOE, but rather by private and public utilities licensed by the NRC. For the most part, the NRC is concerned only with radiological safety at those power plants, while non-nuclear safety concerns are regulated primarily by state entities. This regulatory scheme differs dramatically, however, from the manner by which DOE-owned facilities such as the Piketon plant are required to be regulated.

The Atomic Energy Act mandates that DOE own and be responsible for the operation of all nuclear production facilities. It does authorize DOE to contract with private entities for management of the production of special nuclear materials at those facilities, *see* 42 U.S.C. §2061(a), (b), but does not permit the abdication of DOE's exclusive responsibility for the regulation of such facilities and specifically requires that any management contract "*shall* contain provisions . . obligating the contractor to comply with all safety and security regulations . . . ." In accordance with that statutory mandate, DOE and its predecessor agencies have promulgated extensive radiological and non-radiological health and safety standards applicable to its production facilities,[4] and its management con-

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[4] *See* DOE Order 5481, *Safety Analysis and Review*; DOE Order 5482, *Environmental Protection, Safety & Health Protection Appraisal Program*; DOE Order 5483, *Occupational Safety &*

tracts specifically require the imposition of occupational health and safety standards developed by DOE.

Appellant manages the Piketon plant pursuant to such a contract with DOE. That contract contains a clause typical of provisions which govern DOE's nuclear production facilities nationwide, providing:

> The corporation shall take all reasonable precautions in the performance of the work under this contract to protect the safety and health of employees and of members of the public and shall comply with all applicable safety and health regulations and requirements [including reporting requirements] of DOE . . . . In the event that the corporation fails to comply with said regulations or requirements of DOE, the contracting officer may, without prejudice to any other legal or contractual rights of DOE, issue an order stopping all or any part of the work; . . . .

Article XX, Contract No. DE AC05 760R00001.

On or about July 30, 1980, Esto R. Miller, an employee of the Appellant, was injured at the Piketon

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Health Program for DOE-Contractor Employees At Government Owned Contractor Operated Facilities. The DOE's regulation of occupational health and safety at the Piketon plant has been remarkably successful. For the years 1980 to 1985, there were no employee deaths at the Piketon plant and the average injury rate was approximately 1.1 for every 100 employees. In contrast, figures prepared by the Industrial Commission of Ohio reveal that, for the years 1980 to 1985, the average worker fatality rate at Ohio companies was 5.7 per 100,000 employees, and the average injury and illness rate was approximately 2.6 for every 100 workers.

plant when he fell from a federally owned mobile scaffolding and fractured his left ankle. Miller received approximately $9,000 in benefits under the Ohio Worker's Compensation Law. After returning to work, Miller applied to the Commission for an additional award on the ground that the Piketon plant failed to comply with Ohio Specific Safety Requirements. Article II, Section 35 of the Ohio Constitution provides for such an award when a claimant's injury results from an employer's failure to comply with a specific safety requirement promulgated by the Commission.

The Commission rejected Miller's application on the basis of federal pre-emption, but following the institution of an action by Miller in the Franklin County Court of Appeals, the Court issued a writ of mandamus requiring the Commission to take jurisdiction over Miller's application. In the decision appealed from herein, the Ohio Supreme Court likewise upheld the Ohio regulation against the federal constitutional challenge.

The decision of the Ohio Court represents the first time in the documented history of operation of DOE-owned facilities that imposition of state-promulgated occupational health and safety standards has been attempted in state administrative or judicial proceedings. The United States has traditionally exercised exclusive jurisdiction over occupational health and safety at those facilities and, prior to the decision appealed herein, no State has ever challenged that federal authority in formal proceedings.

THE QUESTIONS ARE SUBSTANTIAL

This case involves important questions concerning the scope of the Supremacy Clause which may pro-

foundly effect the relationship of the federal and state governments under the framework of the Constitution. The decision of the Ohio Supreme Court, from which appeal is taken, permits direct state regulation of a facility owned and controlled by the United States, even though Congress has not consented to such state regulation. Moreover, the federal facility here involved is charged with performing critical national security functions, and the Ohio Supreme Court's holding fails to recognize the preemptive effect of the Atomic Energy Act with respect to state regulation of such facilities. Clearly, this case presents substantial constitutional questions which require resolution by this Court.

A. The Federally Owned Piketon Plant Is Exempt From The Threatened State Regulation Under the Supremacy Clause

The Supremacy Clause of the United States Constitution, Article VI, Section 2, provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Where federal facilities are involved, this Constitutional mandate operates to preempt all state regulation absent an express Congressional intent to the contrary. *Hancock v. Train*, 426 U.S. 167 (1976). As the dissenting opinion below recognized, in *Hancock* this Court reiterated the well-established principle first

recognized in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), that where . . . "Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free of regulation", and held:

> [b]ecause of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."

Id. at 179 (quoting *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954); *Paul v. United States*, 371 U.S. 245, 263 (1963); and *California ex rel. State Water Resources Control Board v. Environmental Protection Agency*, 511 F.2d 963, 968 (9th Cir. 1975), *rev'd on other grounds*, 426 U.S. 200 (1976)). Moreover, in the decade following that decision, the Constitutional exemption from state intrusion affirmed in *Hancock* has been applied repeatedly by this Court and other federal courts to shield federal facilities from state regulation in a variety of circumstances.[5]

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[5] *See, e.g., Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 227 (1976); *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1055 (9th Cir. 1985); *Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary*, 683 F.2d 1171, 1178-79 (8th Cir. 1982); *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 605 (9th Cir. 1981); *Don't Tear It Down, Inc. v. Pennsylvania Avenue Devel. Corp.*, 642 F.2d 527, 534-36 (D.C. Cir. 1980); *Minnesota v. Hoffman*, 543 F.2d 1198, 1208-09 (8th Cir. 1976), *cert. denied and app. dismissed*, 430 U.S. 977 (1977).

In this case, Section 41 of the Atomic Energy Act requires government ownership of and vests DOE with exclusive jurisdiction over all aspects of nuclear production and utilization facilities. 42 U.S.C. §2061(a) (1982). Despite this unambiguous grant of Congressional authority, however, and without as much as citing, let alone distinguishing the *Hancock* decision, the majority of the Ohio Supreme Court authorized state regulation of the Piketon plant. Such a determination ignores the most basic application of the Supremacy Clause. Moreover, the failure of the Ohio court to recognize the incidents of federal ownership described in *Hancock* is particularly egregious where, as here, Congress has expressly *required* exclusive federal ownership of the facilities.

As the dissent below recognized, there is simply no Congressional statement of any sort authorizing the State of Ohio, or any other state, to regulate occupational safety and health conditions at DOE-owned and regulated facilities. Therefore, any such "attempts to regulate, supervise, or in any way deal with the safety and health aspects of such facilities are *per se* invalid". 26 Ohio St. 3d at 113, 5a, *infra*.

Likewise, this result is not changed by the fact that the Piketon plant is operated by a private contractor on behalf of the federal government. Indeed, *Hancock* itself involved threatened state regulation of a similar gaseous diffusion plant then operated by a private contractor at Paducah, Kentucky.[6] *See also Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956).

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[6] 426 U.S. 167, 174 n. 23 (1976).

In *Hancock* this Court held that despite an explicit Congressional mandate requiring federal installations to comply with *state* established air pollution control and abatement requirements (contained in Section 118 of the Clean Air Act), for state enforcement of those requirements to be constitutionally permissible there must be "a *clear and unambiguous* Congressional authorization for [such state] regulatory authority". 426 U.S. at 191. In the instant case, however, there is *no* Congressional mandate of any sort permitting state regulation of occupational health and safety at DOE owned production facilities. Therefore, it is unnecessary to engage in an analysis regarding the extent to which state regulation is permissible. Since there is no Congressional authorization for state health and safety regulation of the federal facilities here at issue, pursuant to the Supremacy Clause of the Constitution no such state regulation may be permitted.

In light of the mandate of Supremacy Clause, as expressed by this court in *Hancock v. Train*, *supra*, coupled with the Congressional requirement that nuclear production facilities such as Piketon be exclusively owned and controlled by the United States, the Ohio Court's authorization of state regulation is erroneous on its face. This Court should summarily reverse the Ohio Supreme Court's holding herein or, at a minimum, note probable jurisdiction in order to correct that erroneous decision and reaffirm the continuing validity of these basic Constitutional doctrines.

B. The Atomic Energy Act of 1954 Preempts State Regulation of Federally Owned Nuclear Production Facilities.

The Supremacy Clause of the United States Constitution operates to preempt state regulation in sev-

eral circumstances. One such circumstance occurs when Congress directly expresses an intent to preempt state law. *See, e.g., Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983); *Campbell v. Hussey*, 368 U.S. 297 (1961). Here, Congress has affirmatively vested the exclusive authority to regulate the health and safety aspects of federally-owned nuclear production facilities, such as the Piketon plant, in DOE and its predecessor agencies, the Atomic Energy Commission (AEC) and the Energy Research and Development Agency (ERDA).[7] By statute, DOE is made the "exclusive owner of production facilities." 42 U.S.C. § 2061(a). In addition, when DOE and its predecessors enter into contracts with entities obligating them to produce special nuclear material in facilities owned by DOE, federal law expressly requires that such contracts "contain provisions . . . obligating the contractor to comply with all safety and security regulations which may be prescribed" by DOE. *Id.* §2061(b). *See also* 42 U.S.C. §2201(i)(3).

The exclusivity granted DOE in connection with the regulation of occupational health and safety at nuclear production facilities has never been seriously questioned. Likewise, it has been universally held that any state or private activity which attempts to regulate, supervise, or in any way deal with matters similarly subject to DOE authority is *per se* invalid and

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[7] *See* Atomic Energy Act of 1946, §4(c)(2)(b), P.L. 585, 79th Cong., 50 Stat. 755-75 (1946); Energy Reorganization Act of 1974 §101(d), P.L. 93-438, 88 Stat. 1233, 42 U.S.C. (1974); Sen. Rep. 93-980, 1974 U.S. Cong. and Admin. News 5470, 5492 (1974).

preempted by federal law. *See Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983); *County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52 (2d Cir. 1984); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

Finally, the exclusivity of federal occupational health and safety regulation at facilities such as the Piketon plant is buttressed by the more than 43 years of federal regulation by DOE and its predecessor agencies. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Pursuant to Congressional directives, as well as the express requirements contained in 42 U.S.C. §§ 2061 and 2201(i), DOE and its predecessors have promulgated a pervasive regulatory system which includes extensive radiological and nonradiological health and safety standards applicable to its contractor-managed facilities. Consistent therewith, each of its management contracts contains provisions requiring compliance "with all applicable safety and health regulations and requirements of DOE."[8]

The dissenting opinion below expressly recognized that "Congress mandated the development of comprehensive federal safety regulations" and that "through Orders 5481, 5482 and 5483, DOE had promulgated both radiological and nonradiological stand-

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[8] There is admittedly also a contractual provision requiring contractor compliance with "applicable" state law. However, state occupational health and safety laws have always been considered to be *inapplicable* to DOE-owned nuclear production facilities.

ards specifically applicable to its federally owned, contractor operated facilities."[9] However, the majority ignored the effect of those standards on the basis of an apparent misconception that for a federal regulatory framework to be preemptive it must be expressly contained within a federal *statute*, rather than authorized thereunder. (*See* appendix 4a). Such is clearly not the law.

The statutory scheme and regulatory practice of DOE evince a clear intent to regulate all aspects of occupational safety and health at DOE-owned facilities and to preclude any state regulation in that area. Since the federal government has completely occupied the field, there is no authority for state regulation, *see Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, *supra*, and such regulation cannot be permitted in this case.

In concluding that there was no preemption, the Ohio Supreme Court confused privately and publicly owned nuclear power plants licensed by NRC, with the much more closely regulated nuclear production and utilization facilities owned by DOE. In its opinion, the Ohio Court noted:

> Nowhere in the Atomic Energy Act has Congress expressly preempted state authorities from applying workers' compensation safety requirements to protect workers at *nuclear power plants* against safety hazards unrelated to radiation. (Emphasis added).

[9] The AEC had established such regulations in the Atomic Energy Commission Manual Chapters 0501, 0502, 0504, 0505, 0510, 0513, 0521, 0524, 0526, 0527, 0528, 0529, 0530, 0540, 0544, 0545, 0550, 0552, 0553, 0555 and 0560.

While such a statement may arguably be correct, the regulatory scheme governing nuclear *power plants* is completely different from that governing DOE-owned facilities, such as the Piketon plant.

Federal law provides authority for the establishment of regulatory agreements between the NRC and the states. *See* 42 U.S.C. § 2021. In that context, Section 2021(k) provides that:

> Nothing *in this section* shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards. (Emphasis added).

However, this Court has expressly held that Section 2021 "does not represent an affirmative grant of power to the states," *Pacific Gas & Electric Co.*, *supra*, 461 U.S. at 210, and, therefore, in no way disturbs the rights and prerogatives granted to *DOE* under 42 U.S.C. §§2061, 2201(e), and 2201(i). Moreover, Section 2021 applies only to *NRC* licensees. No agreement for state health or safety regulation has ever been entered into by DOE or its predecessors with respect to any of its federally owned facilities.[10]

[10] DOE's exclusive regulatory authority at nuclear production facilities such as Piketon also precludes regulation by other federal agencies, including OSHA. In § 54(b)(1) of the Occupational Health and Safety Act, Congress specifically exempted from regulation by the Department of Labor "working conditions of employees which were regulated by the AEC at its facilities." 29 U.S.C. § 653 (b)(1). This statutory exemption was explicitly recognized by Secretary of Labor Brennan in correspondence between the AEC and the Department of Labor, which was written in late 1973 and early 1974. *See* appendix 53a to 62a. In that correspondence, the Piketon Plant is expressly recognized as a

The members of the Ohio Court apparently overlooked this important distinction.

Finally, in view of the statutory requirements governing regulation of nuclear production facilities, not to mention the basic Constitutional principles applicable to all federal operations, the Ohio Supreme Court's reliance upon *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), for permitting the state regulation herein is clearly misplaced. As an initial proposition, *Silkwood* did not involve state regulation of a federal facility, but dealt with whether traditional state tort remedies were available to a plaintiff in a civil damage action for alleged radiation poisoning. The issues are in no way similar, since the Ohio VSSR scheme here involved, although containing remedial provisions, nevertheless has been specifically held to be "regulatory in nature", *supra* at page 5, and now requires the issuance of compliance orders and imposition of fines. (*See* §4121.47, Ohio Revised Code and regulations promulgated thereunder, appendix 46a-52a).

Furthermore, in *Silkwood* this Court allowed the application of state law only because it expressly found that the federal statutory and regulatory scheme did *not* cover the matter at issue. (*See* discussion at 464 U.S. at 251, 252). In this instance, however, on apparent authority of *Silkwood*, the Ohio Supreme Court has permitted state regulation despite the existence of a federal statutory and regulatory framework which is both comprehensive and pervasive.

facility exempt from occupational health and safety by any agency other than the AEC. *See also* appendix 75a.

Finally, and most significantly, this Court decided *Silkwood* in the context of a privately-owned NRC licensed facility subject to numerous areas of state regulation. The Piketon plant, on the other hand, is statutorily required to be owned and controlled by the federal government and is subject to no state occupational safety and health regulation, DOE and its predecessor agencies maintaining exclusive jurisdiction over all aspects of radiological and nonradiological health and safety. The Ohio Supreme Court's extension of this Court's decision in *Silkwood*, therefore, completely ignores the factual distinction between the two cases, and in the face of the clear Congressional mandate governing nuclear production facilities cannot be permitted to stand.

The State of Ohio's attempted regulation of the operation of the DOE-owned Piketon plant represents an impermissible intrusion into the federal domain in clear violation of the Supremacy Clause of the United States Constitution. It is thus respectfully suggested that this Court should summarily reverse the decision of the Ohio Supreme Court, or, if it deems it more appropriate, note probable jurisdiction herein in order to adjudicate the case on the merits, correct the misapplication of the *Silkwood* decision, and reaffirm the Constitutional principles of federal supremacy and preemption enunciated in *Hancock v. Train*.[11]

[11] Although the dissenting opinion in the Ohio Supreme Court recognized the applicability of *Hancock*, the majority did not even address the question of the Piketon plant's exemption from state regulation. In doing so, it failed to abide by the provisions of the Supremacy Clause which require state judiciaries to recognize established federal authority and, by its silence, apparently either attempted to overrule *Hancock* or acted as though this Court had overruled that case.

CONCLUSION

For the above reasons, this Court should summarily reverse the determination below, or, in the alternative, note probable jurisdiction over this appeal.

Respectfully submitted,

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Counsel for Appellant

January 17, 1987

APPENDIX

APPENDIX A

THE STATE, EX REL. MILLER,
Appellee,

v.

INDUSTRIAL COMMISSION OF OHIO *et al.*;
GOODYEAR TIRE & RUBBER COMPANY,
Appellant.

[Cite as State, ex rel. Miller, v. Indus. Comm. (1986), 26 Ohio St. 3d 110.]

Workers' compensation—Scaffolds—Specific safety requirements not preempted by Atomic Energy Act of 1954 for worker injured in nuclear production facility owned by federal government.

(No. 85-1524—Decided August 20, 1986.)

APPEAL from the Court of Appeals for Franklin County.

Appellee, Esto R. Miller, was a maintenance mechanic employed by the Goodyear Atomic Corporation. On July 30, 1980, appellee was working on a manually propelled scaffold, removing old piping hangers. While appellee was lowering a section of the upper guardrail, his glove caught on a bolt which was protruding from the surface of the scaffold, pulling him off the platform. He fell approximately six and one-half feet to a concrete floor. Appellee suffered an injury to his left ankle, and his claim for workers' compensation benefits was fully certified by his employer. At the time appellee was injured, he was working at the Portsmouth Gaseous Diffusion Plant, a nuclear production facility owned by the United States Government and operated by Goodyear pursuant to a contract with the United States Department of Energy.

In December 1980, appellee filed an amended application for an additional award for a violation of a specific safety

requirement, asserting that his injury was the proximate result of Goodyear's failure to comply with certain safety standards promulgated by the Industrial Commission. The Industrial Commission held a hearing and found that, because of the doctrine of federal preemption, it did not have jurisdiction to apply the code of specific safety requirements to the Goodyear Portsmouth Gaseous Diffusion Plant. Appellee requested a rehearing which was denied.

Appellee then filed a complaint for a writ of mandamus with the Court of Appeals for Franklin County requesting an order directing the Industrial Commission to consider his application for an additional award. The case was assigned to a referee who recommended that the requested writ be issued. Both the Industrial Commission and Goodyear filed objections to the referee's recommendation. The court of appeals adopted the recommendation of the referee and issued the writ.

The cause is now before this court on an appeal as of right.

Jaffy, Livorno, Kaufmann & Arnett Co., L.P.A., Stewart R. Jaffy, John F. Livorno and *Henry A. Arnett*, for appellee.

Vorys, Sater, Seymour & Pease and *Robert E. Tait*, for appellant.

Per Curiam. The sole issue in this case is whether the Atomic Energy Act of 1954 preempts the Industrial Commission from considering the merits of appellee's application for an additional award for a specific safety violation. The doctrine of federal preemption has its roots in the Supremacy Clause of the United States Constitution, in Article VI, which states in pertinent part:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; * * * shall be the Supreme Law of the Land; and the Judges in every

State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

There are generally three tests for federal preemption. Congress may expressly preempt state authority in a given area. *Jones v. Rath Packing Co.* (1977), 430 U.S. 519. Absent express preemption, where state law conflicts with or frustrates federal law or its objectives, federal law may supersede state law. *Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132. Additionally, if a scheme of federal regulations is so pervasive so as to leave no room for the states to supplement it, federal preemption may be found. *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218.

The state authority involved in the instant case is the Industrial Commission and its specific safety requirements. The federal law which allegedly preempts the Industrial Commission from applying its specific safety requirements is the Atomic Energy Act of 1954, Section 2011 *et seq.*, Title 42, U.S. Code. The United States Supreme Court discussed the preemption doctrine in the context of the Atomic Energy Act of 1954 in the recent case of *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238. The *Silkwood* court held at 256-257:

"* * * [I]nsofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standard or whether the imposition of a state standard in a damages action would frustrate the objectives of federal law."

Nowhere in the Atomic Energy Act has Congress expressly preempted state authorities from applying workers' compensation safety requirements to protect workers at nuclear power plants against safety hazards unrelated to radiation. Similarly, the specific safety requirements em-

bodied in Ohio workers' compensation law do not conflict with or frustrate the Atomic Energy Act of 1954 or its objectives.

The question which remains is whether the scheme of federal regulations set forth in the Atomic Energy Act is so pervasive as to leave no room for state supplementation. The intent of Congress in promulgating the Atomic Energy Act was to provide regulation and controls necessary to minimize hazards inherent to the production of nuclear power. As recognized by the *Silkwood* court, that Act does not completely occupy the field of safety at nuclear production facilities. The Atomic Energy Act does not even address the basic safety precautions necessary to protect workers in any manufacturing plant. The instant case involves an injury to a worker because of an allegedly defective scaffold. It could not have been the intent of Congress to allow the state of Ohio to protect every worker who uses a scaffold, except those workers who use scaffolds at atomic energy plants. Since the entire field of safety at nuclear production facilities is not regulated by the Atomic Energy Act, the court of appeals was correct in concluding that the Industrial Commission is not preempted from applying Ohio's specific safety requirements in the case at bar.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C. J., SWEENEY, LOCHER, HOLMES, C. BROWN and DOUGLAS, J.J., concur.

WRIGHT, J., dissents.

WRIGHT, J., dissenting. As the majority expressed, the Supremacy Clause of the United States Constitution operates to preempt state regulation where there is a direct expression of preemptive congressional intent, *Campbell v. Hussey* (1961), 368 U.S. 297; *Pacific Gas & Elec. Co. v.*

State Energy Resources Conserv. & Dev. Comm. (1983), 461 U.S. 190, where congressional intent is implied, *Burbank v. Lockheed Air Terminal* (1973), 411 U.S. 624; *Bhd. of RR. Trainmen v. Jacksonville Terminal Co.* (1969), 394 U.S. 369, or where there is a conflict between federal and state regulations, *Perez v. Campbell* (1971), 402 U.S. 637; *Hines v. Davidowitz* (1941), 312 U.S. 52.

What apparently escapes the majority's scrutiny is that, where the attempted state regulation involves a federal facility, state regulation is permitted "only when and to the extent there is 'a clear congressional mandate,' * * * that makes this authorization of state regulation 'clear and unambiguous.' " *Hancock v. Train* (1976), 426 U.S. 167, 179. *See Kern-Limerick, Inc. v. Scurlock* (1954), 347 U.S. 110; *United States v. United Mine Workers* (1947), 330 U.S. 258; *M'Culloch v. Maryland* (1819), 17 U.S. (4 Wheat.) 316, 426. In *Hancock v. Train, supra*, the United States Supreme Court stated, "this immunity means that where 'Congress does not affirmatively declare its instrumentalities or property subject to regulation,' 'the federal function must be left free' of regulation." *Id.* at 179. No such congressional exception exists with respect to the Portsmouth Gaseous Diffusion plant. It has been held that any state or private activity that attempts to regulate, supervise, or in any way deal with the safety and health aspects of such facilities is *per se* invalid. See *Pacific Gas & Elec. Co., supra; Northern States Power Co. v. Minnesota* (C.A. 8, 1971), 447 F.2d 1143, affirmed (1972), 405 U.S. 1035; *Suffolk v. Long Island Lighting Co.* (C.A. 2, 1984), 728 F.2d 52.

In the instant case, the Atomic Energy Act ("the Act") requires federal government ownership of and exclusive jurisdiction over nuclear production facilities. Section 2061, Title 42, U.S. Code, provides: "(a) the Commission [the Department of Energy ("DOE")] as agent of and on behalf of the United States, shall be the exclusive owner of all production facilities * * *. (b) * * * To the extent deemed

necessary, the Commission [DOE] is authorized to make, or to continue in effect, contracts with persons obligating them to produce special nuclear material and facilities owned by the Commission. * * * Any contract entered into under this section shall contain provisions * * * obligating the contractor * * * to comply with all safety and security regulations which may be prescribed by the Commission [DOE]. * * * " Clearly, all regulation of the Portsmouth plant is within the exclusive province of the United States, and any state intrusion into that area is absolutely prohibited absent a "clear congressional mandate" to the contrary. *Hancock*, *supra*, at 179.

In granting the writ of mandamus and finding no preemption, the majority confuses the exclusivity granted DOE in the regulation of health and safety at its federally owned, contractor-operated facilities with the more limited authority granted the Nuclear Regulatory Commission ("NRC") over *nonfederally owned* nuclear power plants. Section 2021, Title 42, U.S. Code, authorizes the establishment of regulatory agreements between the NRC (formerly the Atomic Energy Commission ["AEC"]) and the states, Senate Report No. 870, 86th Cong. 1st Session, 1959 U.S. Code Congressional and Administrative News 2872, 2875, 2879. In that context, Section 2021(k) provides, "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." See, also, *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238. Recognizing the inherent limitations of the Act, the United States Supreme Court has held that Section 2021(k) "does not represent an affirmative grant of power to the states," *Pacific Gas & Elec. Co.*, *supra*, at 210, and in no way disturbs the rights and prerogatives granted the federal government under Sections 2061, 2201(e), and 2201(i), Title 42, U.S. Code. Further, Section 2021(c)(1) specifically excepts from its application any nuclear "production or utilization facility," such as the Portsmouth

plant. That section states: "No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of—(1) the construction and operation of any production or utilization facility." Any reliance upon Section 2021 as support for the majority's determination is clearly misplaced.

In *Pacific Gas & Elec. Co.*, *supra*, the United States Supreme Court outlined the parameters of federal preemption under the Act as follows: "State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States. When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.' " *Id.* at 212-213.

The specific safety requirements that Miller seeks to have imposed on the Portsmouth plant fall squarely within an area regulated by the federal government. In the Act, Congress mandated the development of comprehensive federal safety regulations, and through Orders 5481, 5482, and 5483, DOE had promulgated both radiological and nonradiological standards specifically applicable to its federally owned, contractor-operated facilities. In addition, the Goodyear contract itself at Article XX contains an express provision requiring compliance "with all applicable safety and health regulations and requirements * * * of DOE" and prescribing the right to work stoppage if compliance is not effected.

In the Atomic Energy Act, Congress did not express an intention to delegate to the states any of the regulatory authority granted to DOE and, with respect to production

facilities, mandated that sole regulatory control remain with the United States. As a federally owned facility, the Portsmouth plant is under the exclusive control of DOE and the imposition of any state-promulgated regulations on that operation, including Ohio specific safety requirements, is constitutionally and statutorily impermissible. The Industrial Commission was manifestly correct in finding that it lacked jurisdiction to consider Miller's application. The issuance of the writ is clearly improper. The decision of the court of appeals should be reversed.

Accordingly, I respectfully dissent.

APPENDIX B

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

No. 84AP-208
(REGULAR CALENDAR)

STATE OF OHIO, ex rel. ESTO R. MILLER,
Relator,

v.

INDUSTRIAL COMMISSION OF OHIO AND GOODYEAR ATOMIC CORPORATION *et al.*,
Respondents.

OPINION

Rendered on July 25, 1985

STEWART JAFFY, LIVORNO, KAUFMANN & ARNETT CO., L.P.A., MR. STEWART R. JAFFY, MR. JOHN F. LIVORNO, and MR. HENRY A. ARNETT, for relator.

MR. ANTHONY J. CELEBREZZE, JR., Attorney General, MR. LEE M. SMITH, and MR. DOUGLAS M. KENNEDY, for respondents, Industrial Commission of Ohio and James Mayfield, Administrator.

VORYS, SATER, SEYMOUR & PEASE, and MR. ROBERT E. TAIT, for respondent Goodyear Atomic Corporation.

IN MANDAMUS

McCORMAC, J.

This action in mandamus was referred to Jack R. Kullman, Jr., as referee with full powers under Civ. R. 53. He issued his report on December 17, 1984. The case is now before us on objections to that report, wherein he recommended a writ of mandamus be issued ordering the Industrial Commission to determine whether Goodyear Atomic Corporation (hereinafter Goodyear) is obligated to pay benefits to relator, Esto R. Miller, for violation of a specific safety requirement.

Relator was injured in the course of his employment with respondent Goodyear, having fallen from a scaffold on which he was standing while removing old pipe hangers. Miller was compensated for a fracture of the left ankle. Subsequently, Miller filed an application for an additional award for violation of a specific safety requirement. The Industrial Commission held a hearing and found that, because of the doctrine of federal preemption, they did not have jurisdiction to decide if the Code of Specific Safety Requirements was applicable to the Goodyear Portsmouth Gasseous Diffusion Plant. After rehearing was denied, relator requested a writ of mandamus ordering the commission to consider the application. The referee recommended the writ be issued and the commission and Goodyear have objected.

Respondents' objection to the referee's report is that he erroneously failed to find that federal law preempts state authority from considering the award of additional compensation to the employee for an alleged violation by Goodyear of a specific safety requirement. The federal law which the employer argues preempts state authority is the Atomic Energy Act of 1954. Section 2011 *et seq.*, Title 42, U.S. Code. Goodyear Atomic Corporation is a private corporation under contract with the Department of Energy pursuant to a section of this act, Section 2061, Title 42, U.S.

Code, to operate a nuclear production and enrichment facility known as the Portsmouth Gasseous Diffusion Plant. According to Goodyear, the land, buildings, equipment, supplies, raw material and final product are completely owned by the United States government. Goodyear argues that, because its plant is owned exclusively by the federal government, the doctrine of federal preemption precludes application of the specific safety requirements to them.

The doctrine of federal preemption has its roots in the Supremacy Clause of the United States Constitution. Clause 2, Article VI, United States Constitution, states:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *** shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The test for preemption has been variously expressed throughout the years. Congress may expressly preempt state authority in a given area. *Jones* v. *Rath Packing Co.* (1977), 430 U.S. 519. Absent express preemption, where state law conflicts or frustrates federal law or its objectives, federal law may supersede state law. *Florida Lime and Avocado Growers, Inc.*, v. *Paul* (1963), 373 U.S. 132. Additionally, if the scheme of federal regulation is so pervasive so as to leave no room for the states to supplement it, federal preemption may be found. *Rice* v. *Sante Fe Elevator* (1947), 331 U.S. 218. Most recently, the preemption doctrine was discussed in the context of the Atomic Energy Act in *Silkwood* v. *Kerr-McGee Corp.* (1984), ___ U.S. ___, 104 S.Ct. 615. In *Silkwood* an employee of Kerr-McGee allegedly was injured from contamination by plutonium exposure in defendant's plant. A tort action was commenced against Kerr-McGee, which owned the federally licensed and regulated nuclear plant where the injury occurred. The jury awarded compensatory and punitive

damages to plaintiff. Kerr-McGee appealed and the Court of Appeals for the Tenth Circuit reversed as to the punitive damages. The United States Supreme Court reversed, reinstated the punitive damage award, and held that for federally licensed nuclear facilities, Congress has not evidenced an intent to occupy the field. Thus, "insofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standard or whether the imposition of a state standard in a damages action would frustrate the objectives of federal law." *Id.* at 626.

Comparing *Silkwood* to the instant case, the regulation allegedly in conflict with federal law, *i.e.* the specific safety requirement, is similar to the punitive damage award upheld in *Silkwood* in that penalties result when the employer's conduct falls below a state established acceptable level. Furthermore, the injury in *Silkwood* was caused by radiation which admittedly is closer related to the risks which Congress was trying to regulate in the Atomic Energy Act. Here the injury to Miller was a fractured left ankle as a result of falling off a scaffold. Relator seeks to assert before the Industrial Commission that the fall was caused by protruding parts from the scaffold in violation of the specific safety requirement found in Ohio workers' compensation law. However, the ankle injury had nothing whatsoever to do with, nor was it caused by, aspects of nuclear energy which Congress intended to control and regulate.

As noted, the facility in *Silkwood* was a privately owned, federally licensed nuclear power plant. Goodyear argues that, because the Portsmouth Gasseous Diffusion Plant is owned exclusively by the federal government, *Silkwood* is distinguishable since the federal government has preempted the field because Section 2061(b)(2)(c), Title 42, U.S. Code,

obligates Goodyear to comply with all safety security regulations provided by the Atomic Energy Commission. However, this language should be interpreted in the light of Section 2021, relating to cooperation with the states and the purpose which is safety in control of radiation hazards. The express preemption should be limited to safety and security concerning these types of hazards rather than unrelated safety hazards. There is no indication in the record that the Atomic Energy Commission has prescribed to Goodyear safety regulations concerning unrelated hazards such as scaffolding. Hence, we conclude that, as in *Silkwood*, the federal government has not evidenced an intent to occupy the entire field of safety in regard to federally owned plants which are leased under contract to private entities, but only to preempt the field as to radiation safety and security, both in operation and construction of the plant. Fortifying our conclusion is Section 2021(k), Title 42, U.S. Code, which is consistent with this conclusion, and states:

> **"State regulation of activities for certain purposes**
>
> "(k) Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."

In *Pacific Gas and Electric Co.* v. *State Energy Resources Conservation & Development Comm.* (1983), ___ U.S. ___,103 S.Ct. 1713, the Supreme Court pointed out that under the Atomic Energy Act of 1954, the federal government maintains complete control of the safety and nuclear aspects of energy generation, but that a state law which does not seek to regulate the construction or operation of a nuclear power plant is valid and not in conflict with or preempted by federal law. The court pointed out that the federal government has occupied the entire field of nuclear safety concerns and hence, the state may not

act in this field even in an area where the federal law is silent. Hence, a state safety regulation that was related to the operation or construction of a nuclear power plant that would in any way affect the operation or construction of the plant in regard to the stated purpose of the Atomic Energy Act, safety in control of radiation hazards, is invalid. State safety regulations lying outside this area of express preemption which do not frustrate the federal law or its purposes are not preempted.

Until it is clear that the federal government has preempted the field of safety regulation for safety hazards unrelated to radiation, or the nuclear aspects of energy generation, it is held that state specific safety regulations that give rise to an award for violation thereof are equally applicable to an entity that contracts with the federal government for operation of a nuclear power facility owned exclusively by the federal government. Otherwise, employees in the Goodyear Atomic plant would not have the protection against safety hazards unrelated to radiation that other employees in Ohio enjoy.

The objections to the referee's report are overruled.

The recommendation of the referee is adopted. The writ of mandamus ordering the Industrial Commission to consider the violation of the specific safety requirement is granted.

Writ of mandamus granted.

STRAUSBAUGH and WHITESIDE, JJ., concur.

APPENDIX C

THE INDUSTRIAL COMMISSION OF OHIO

Employee	Esto R. Miller	Claim No.	80-19975
Street and No.	Route 1, Box 111 JJ	Date of Injury	7-30-80
City	McDermott, OH 45652	Manual No.	9063
Employer	Goodyear Atomic Corp.	Risk No.	258953
Street and No.	P. O. Box 628		
City	Piketon, OH 45661		

This claim came on for hearing before Hearing Officer David R. Packer as provided for in Revised Code Section 4121.06 on claimant's Application for an Additional Award for Violation of Specific Requirement filed 10-24-80 and 12-22-80

Notices were mailed to the claimant, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date.

It is the finding of the Hearing Officer that this claim has been recognized for: Fracture of left ankle.

It is the order of the Industrial Commission that claimant's Application for Additional Award for Violation of a Specific Safety Requirement filed October 24, 1980 and December 22, 1980 be denied for the reason that the Codes of Specific Safety Requirements adopted by the General Assembly and Industrial Commission may not be applied to the Portsmouth Gaseous Diffusion Plant under the doctrine of federal preemption.

The finding and order are based upon the report of James G. Johnson, Investigator, Division of

Safety and Hygiene, the evidence in the file, and the evidence adduced at the hearing.

CC: Claimant
Employer
Parker & Douthat
Law

FINDINGS MAILED: 3-8-83 dc

A Motion for Rehearing may be filed within thirty days of the receipt of this order in accordance with the provisions of 4121-3-20 (G) of the Rules of Procedure of the Industrial Commission.

7-13-82 — /s/ DAVID PACKER
cid Date of Hearing — Hearing Officer

The above findings and order was approved and confirmed by the following members of the Commission by circulation:

_____ — /s/ WILLIAM W. JOHNSTON, Chairman
Date of Approval

/s/ W. CRAIG ZIMPHER, Chairman

/s/ RAYMOND A. CONNOR, Vice President

_____ — /s/ STEVEN A. HATTEN, Vice Chairman
Secretary

/s/ LEONARD T. LANCASTER, Member

APPENDIX D

THE INDUSTRIAL COMMISSION OF OHIO

Record of Proceedings

Employee:	Esto R. Miller	Claim No.:	80-l9975
Street & No.:	1519 Kendall Ave. Apt. 31	Date of Injury:	7/30/80
City:	Portsmouth, OH 45662	Manual No.:	9063
Employer:	Goodyear Atomic Corp.	Risk No.:	258953
Street & No.:	P.O. Box 628		
City:	Piketon, OH 45661		

This claim came on for hearing before Hearing Officer, Jeanine M. Repa, as provided for in the Industrial Commission Rule 4121-3-20-(G) on Claimant's Motion for Rehearing filed 4/5/83 from the order of 7/13/82, denying claimant's Application for an Additional Award for Violation of Specific Safety Requirement(s), findings mailed 3/8/83.

This claim has been recognized for: Fracture of left ankle.

The Hearing Officer finds that the Motion for Rehearing was not accompanied by new and additional proof not previously considered. Furthermore, a review of

1. the investigation report;
2. arguments made in writing on behalf of the claimant and of the employer, and
3. the decision of the Hearing Officer (with reasons outlined in the Interoffice-Communication dated 2/14/83)

failed to show an obvious mistake of fact.

The Motion for Rehearing does not meet the criteria outlined in the Industrial Commission Rule 4121-3-20(G) and it is, therefore, denied without further hearing.

FINDINGS MAILED: 8/3/83:yj
cc: Employer: Vorys, Sater & Assoc.
Claimant: Robert E. Tait
LAW

The above finding and order was approved and confirmed by the following members of the Commission by circulation:

W. CRAIG ZIMPHER, CHAIRMAN
STEVEN A. HATTEN, VICE CHAIRMAN
LEONARD T. LANCASTER, MEMBER
Hearing Officer

DATE OF HEARING: July 11, 1983
JMR:sdc

APPENDIX E

THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM

To wit: August 20, 1986

Case No. 85-1524

STATE OF OHIO, ex rel. ESTO R. MILLER,
Appellee,

v.

INDUSTRIAL COMMISSION OF OHIO, *et al.*,
Appellants.

JUDGMENT ENTRY

APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Franklin County, was considered in a manner prescribed by law. On consideration thereof, judgment of the Court of Appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellee recover from the appellants its costs herein expended; and that a mandate be sent to the Court of Appeals to carry this judgment into execution; and that a copy of this entry be certified to the Court of Appeals for Franklin County for entry.

/s/ FRANK D. CELEBREZZE
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this date _____.

/s/ JAMES WM. KELLY CLERK

/s/ DANIEL J. CROWLEY DEPUTY

THE SUPREME COURT OF OHIO

COLUMBUS

1986 TERM

To wit: August 20, 1986

Case No. 85-1524

STATE OF OHIO, ex rel. ESTO R. MILLER,
Appellee,

v.

INDUSTRIAL COMMISSION OF OHIO *et al.*,
Appellants.

MANDATE

To the Honorable Court of Appeals.

Within and for the County of Franklin, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution.

Judgment of the Court of Appeals is affirmed consistent with the opinion rendered herein.

COSTS:

Filing Fee, $20.00, paid by Vorys, Sater, Seymour & Pease.

/s/ FRANK D. CELEBREZZE
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this date _____.

/s/ JAMES WM. KELLY CLERK

/s/ DANIEL J. CROWLEY DEPUTY

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 85-1524

THE STATE OF OHIO *ex rel.* MILLER,
Appellee,

v.

INDUSTRIAL COMMISSION OF OHIO, *et al.*,
GOODYEAR ATOMIC CORPORATION,
Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Goodyear Atomic Corporation, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Ohio, affirming the court of appeals' issuance of a writ of mandamus, entered in this action on August 20, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

VORYS, SATER, SEYMOUR AND PEASE

/s/ ROBERT E. TAIT
ROBERT E. TAIT
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6341

Counsel for Appellant Goodyear Atomic Corporation

PROOF OF SERVICE

I, Robert E. Tait, a member of the Bar of the Supreme Court of the United States, hereby certify that on this *27th* day of October, 1986, in compliance with Rule 28.3 of the Supreme Court of the United States, copies of this Notice of Appeal in the above-entitled case were mailed, first-class postage prepaid, to the following:

Stewart R. Jaffy
Stewart, Jaffy, Livorno, Kaufmann
& Arnett Co., L.P.A.
21 East State Street
Columbus, Ohio 43215
Counsel for appellee Esto R. Miller

Anthony J. Celebrezze, Jr.
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43215
Counsel for appellants Industrial
Commission of Ohio and Administrator,
Bureau of Worker's Compensation

I further certify that all parties required to be served have been served.

VORYS, SATER, SEYMOUR AND PEASE

/s/ ROBERT E. TAIT
ROBERT E. TAIT
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6341

Counsel for Appellant Goodyear Atomic Corporation

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF OHIO

84AP208
No. 85-1524

THE STATE OF OHIO *ex rel.* MILLER,
Appellee,

v.

INDUSTRIAL COMMISSION OF OHIO, *et al.*,
GOODYEAR ATOMIC CORPORATION,
Appellants.

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VORYS, SATER, SEYMOUR AND PEASE

/s/ ROBERT E. TAIT
ROBERT E. TAIT
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6341

Counsel for Appellant Goodyear Atomic Corporation

PROOF OF SERVICE

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I further certify that all parties required to be served have been served.

VORYS, SATER, SEYMOUR AND PEASE

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52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6341

Counsel for Appellant Goodyear
Atomic Corporation

APPENDIX H

HISTORY OF OCCUPATIONAL HEALTH AND SAFETY AT DOE FACILITIES

DOE's program of occupational health and safety regulation at its facilities was begun 43 years ago by DOE's predecessor agencies. The history of that program is replete with congressional recognition and endorsement of the practice of exclusive federal regulation of occupational health and safety at those facilities.

BACKGROUND - MANHATTAN ENGINEERING DISTRICT REGULATION

In 1943, the United States was compelled to develop and produce nuclear weapons in order to assure victory in the Second World War. In order to achieve this goal, a special organization, the Manhattan Engineering District of the War Department was established. Since there was no industrial infrastructure to support the development and production of nuclear weapons, in a "crash" program, the Manhattan Engineering District (MED) built facilities at sites throughout the United States. These comprised a national industrial complex dedicated to the national defense. These facilities built for the research of, production of materials for, and production of the Atomic Bomb, were operated under cost-plus-fixed-fee contracts which are the predecessors of the management and operating contracts, under which DOE research, production, and defense facilities are operated today.

In 1943, there was no federal statutory framework for regulation of occupational health and safety. Nor did any state have a comprehensive program for workers' safety at that time. However, it was clear to the progressive commanders of MED that there was a need for such federal regulation at the facilities where materials for nuclear weapons and the weapons themselves were produced. Accordingly, a program of federal regulation of occupational

health and safety was established at these facilities through inclusion in MED contracts of an accident prevention clause requiring the contractor to take steps to protect the lives and health of workers in accordance with requirements established by the MED's contracting officers.

REGULATION BY THE AEC UNDER THE ATOMIC ENERGY ACT OF 1946

Subsequent to the conclusion of the World War, Congress determined that it was necessary to turn matters related to nuclear research and nuclear weapons over from military to civilian control. In order to do this, it enacted the Atomic Energy Act of 1946. P. L. 585, 79th Cong., 50 Stat. 755-75 (1946). In accordance with the terms of the Act, in 1947, under Executive Order No. 9816, 12 Fed. Reg. 37 (1947), the MED turned control of its facilities, and assigned the contracts for the management of those facilities, over to the Atomic Energy Commission (AEC) which was created by that Act. For the first time, through § 4(c)(2)(b) of the Act, an agency of the Federal Government was granted express statutory authority to issue and assure compliance with safety regulations at facilities involved in the production of fissionable materials. Throughout the period of AEC management of its facilities, occupational health and safety continued to be regulated by the Federal Government through its contracts, and the contracts evolved through a process of accretive modifications from the MED construction contracts to something approaching the modern management and operating contract of today.

On October 13, 1952, the AEC entered into a letter contract with GAT, in anticipation of entry into a definitive management and operating contract which was to be negotiated. Under the contract, GAT was required to participate in the development of a Government-owned gaseous diffusion plant for the enrichment of uranium which was to be located in Pike County, Ohio, approxi-

mately 22 miles north of Portsmouth, Ohio. The terms of the letter contract were, like those in all letter contracts of that time, very general.

REGULATION BY THE AEC UNDER THE 1954 ACT

Today, the Portsmouth Gaseous Diffusion Plant enriches and refines feed materials to assays which may be used for civilian energy and national defense purposes. It, and DOE's Gaseous Diffusion Plant at Paducah, Kentucky, are the only such facilities currently operating in the United States. It is the sole operation with the capacity to enrich uranium to an assay which is required by the United States Navy to power its nuclear ships and submarines. Due to the obvious national security considerations involved, the design and technology utilized is highly classified and access to the plant is severely restricted.

While the Plant was being built, GAT assisted in the Plant's development and continued to perform work under its letter contract, as amended, until January 21, 1957, when it entered into a definitive management and operating contract, designated Contract No. AT-(33-2)-1, Mod. No. 3. Under Article XVII of that contract, *Safety, Health, and Fire Protection-Permits*, GAT was bound to "comply with all health, safety, and fire protection regulations and requirements (including reporting requirements) of the Commission." It is clear from the contract clause that the AEC intended to regulate nonradiological as well as radiological safety through its regulations at the Portsmouth facility for the production of fissionable material. The clause was inserted in accord with agency practice and to meet congressional requirements which were set forth in the Atomic Energy Act of 1954 at Section 41(b)(2)(c).

When the Portsmouth Gaseous Diffusion Plant began to operate under its new contract in 1957, the activities of that facility were governed by the Atomic Energy Act of 1954. P. L. 83-703, 68 Stat. 919 (1954); 42 U.S.C. 2011 *et seq.* The Congressional purposes of the Atomic Energy

Act of 1954 fell into two broad categories. First, the Atomic Energy Act of 1954 was enacted so as to provide additional congressional guidance for, and more extensive authorities with respect to, activities of the AEC which were being accomplished under the Act of 1946, to include those then planned for the Portsmouth Gaseous Diffusion Plant. The second category of purposes related to the establishment of the framework and mechanism for the development, licensing, and regulation of private nuclear power plants. To a great extent, these two sets of purposes were furthered by provisions set forth in separate portions of the U.S. Code by the 1954 Act. Most of the statutory provisions related to nuclear power plant licensing and regulation are set forth in Subchapter IX of Title 42 Chapter 23, 42 U.S.C. 2131 *et seq.* Within the AEC itself, a separate division was set up to license and regulate nuclear power plants. Other offices and divisions governed the other AEC activities.

The Commission's authority to own and operate facilities for research, weapons production and materials processing is based upon Section 161(e) of the Act. 42 U.S.C. 2201(e). The AEC's authority to prescribe and enforce radiological occupational health and safety at its facilities was established by Section 161(b) of the Act. The Commission's authority to prescribe and enforce nonradiological health and safety standards and regulations at its facilities was separately established by Section 161(i)(3) of the Atomic Energy Act of 1954, which authorized it to

> "prescribe such regulations or orders as it may deem necessary . . . (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operations facilities used in the conduct of such activity in order to protect health and minimize danger to life or property." 42 U.S.C. 2201(i).

In providing his views to the Joint Committee on Atomic Energy during the hearings on S. 3323 and H. R. 8862, the precursors of the Atomic Energy Act of 1954, Commissioner Joseph Campbell expressed the intent of the AEC on the inclusion of Section 161 in the Act:

> "§ 161(i) expressly gives the Commission authority to prescribe enforceable regulations and orders to . . . provide additional health and safety protection in connection with any activities authorized pursuant to the Act. This provision is essential to carry the purposes of the Act." (Hearings before the Joint Committee on Atomic Energy, 83rd Cong. 2nd Sess, June 2, 1954 at p. 601).

Section 41(a) mandated that the Commission be the exclusive owner and operator of all nuclear production facilities. 42 U.S.C. § 2061. With respect to facilities used for the production of fissionable materials, Congress required in Section 41(b)(2)(C), that any "contract entered into" for the purpose of operating such a production facility would "contain provisions . . . obligating the contractor . . . to comply with all safety and security regulations which may be prescribed by the Commission." Thus, the Congress expressly recognized the AEC's practice of regulating both radiological and nonradiological health and safety at its facilities through regulations enforceable under its contracts and required its continuation. The clause currently in the Goodyear contract, descendant of the Safety, Health, and Fire Protection Clause in the 1957 contract, is incorporated so as to meet the Congressional requirement set forth in 41(b)(2)(C) as follows:

> The corporation shall take all reasonable precautions in the performance of the work under this contract to protect the safety and health of employees and of members of the public and *shall comply with all applicable safety and health regulations and requirements [including reporting requirements] of DOE.* . . .

> *In the event that the corporation fails to comply, with said regulations or requirements of DOE, the contracting officer may, without prejudice to any other legal or contractual rights of DOE, issue an order stopping all or any part of the work;. . .* Article XX, Contract No. DE-AC05-760R00001 (Emphasis added).

This clause is typical of such provisions which govern DOE's plants nationwide.

Standards and regulations prescribed by the AEC, were required by Congress to regulate both radiological and nonradiological health and safety at its facilities. They were set forth in the Atomic Energy Commission Manual, at Chapters 0501, 0502, 0504, 0505, 0510, 0513, 0521, 0524, 0526, 0527, 0528, 0529, 0530, 0540, 0544, 0545, 0550, 0552, 0553, 0555, and 0560. These standards and regulations were applied only to facilities owned and operated by the United States under the authority of the AEC. They were not applied at civilian nuclear power facilities licensed and regulated by the AEC's licensing division. Accordingly, while nonradiological health and safety was always regulated by the Federal Government at facilities owned or controlled by the AEC and its successors, they were not so regulated by the Federal Government at private facilities which were merely licensed by the AEC and for which statutory requirements were different. Thus, in accord with statute and through the issuance of regulations, the AEC completely occupied the field with respect to regulation of nonradiological health and safety at facilities owned or controlled by it.

Despite this, certain state administrative bodies did, at times, raise questions with respect to certain safety related-matters at those facilities. The AEC uniformly held to the position that the doctrine of federal preemption granted it and its contractors immunity with respect to activities conducted by AEC management contractors. With respect to matters such as collection and remission of sales

taxes, it was possible to arrive at cooperative arrangements with the states. However, with respect to matters related to occupational health and safety, conflict was avoided by state administrative recognition of the Government's immunity from regulation by the state, through state withdrawal from enforcement efforts. Hiestand and Florsheim, The AEC Management Contract Concept, 29 Fed. F.J. 67, 78-79 (1969). It was consistent with this long-established pattern that the Industrial Commission of Ohio initially held, prior to the decision of the Ohio Court of Appeals in this case, that it did not have jurisdiction to regulate health and safety at the Portsmouth Gaseous Diffusion Plant. Prior to July 1985, no state had ever attempted, either by judicial or administrative proceeding, to enforce its own health and safety regulation on any facility owned by the AEC or its successor agencies.

SUBSEQUENT STATUTORY DEVELOPMENTS

That Congress intended for the AEC to fully occupy the field of occupational safety and health regulation at facilities such as the Portsmouth Plant, under the Atomic Energy Act, is further evidenced by amendments to the Act enacted in 1959. P. L. 86-373, 73 Stat. 688 (1959) (currently codified at 42 U.S.C. § 2021). The amendment permitted the AEC to enter into agreements with states for certain facilities which were regulated and licensed by it. Such facilities, at which the AEC never regulated nonradiological health and safety, were not owned or operated by the AEC. It was made clear in the amendment embodied in § 2021, that no agreement with a state entered into by authority of that amendment could include provisions authorizing state regulation of the "construction or operation of any production . . . facility," such as the Portsmouth Plant. 42 U.S.C. § 2021(c). The provisions of § 2021, permitting some state regulation within an area formerly regulated by the AEC, upon agreement, were meant solely for "AEC licensees." S. Rep. No. 870, 86th

Cong., 1st Sess., *rep'd* in 1959 U.S. Cong. and Admin. News 2872, 2815, 2819, and 2882 (1959). In view of this, it is clear that Congress did not intend to permit any disturbance of exclusive regulatory jurisdiction of occupational health and safety at AEC-owned facilities, even by agreement.

On December 29, 1970, the President signed into law the Occupational Safety and Health Act of 1970 (OSHA). That law became effective on April 28, 1971. OSHA authorized the United States Department of Labor (DOL) to regulate health and safety nationally. It further authorized the Department of Labor to approve state plans for the regulation of workplaces within the respective state jurisdictions and to thus permit occupational safety and health regulation by the states. However, pursuant to § 4(b)(1) of OSHA, Congress specifically exempted from regulation by the Department of Labor "working conditions of employees" which were regulated by the AEC at its facilities. 29 U.S.C. 653(b)(1). This exemption also renders ineffective the waiver of federal preemption of state regulation set forth in § 18 of the Act. See, 29 U.S.C. 667.

The statutory exemption was explicitly recognized by Secretary of Labor Brennan, in correspondence between the AEC and the Department of Labor which was written in late 1973 and early 1974. In that correspondence, the head of the agency responsible for interpretation of OSHA recognized that within OSHA was an expression of congressional intent that the AEC exclusively regulate health and safety at facilities owned or leased by it. In a letter dated February 4, 1974, to the Chairman of the AEC, Secretary Brennan requested that the AEC provide a list specifying such facilities. On May 14, 1974, the AEC produced such a list. The Portsmouth Plant was listed as one of the 71 facilities in 23 states and one United States territory which comprised the AEC complex.

RECENT ORGANIZATIONAL DEVELOPMENTS AND REGULATION

On August 15, 1974, Congress passed the Energy Reorganization Act of 1974. P. L. 93-438, 88 Stat. 1233, 42 U.S.C. § 801 *et seq.* (1974). In that Act, Congress created the Energy Research and Development Administration and the Nuclear Regulatory Commission. Under Title II of that Act, authority to license and regulate private nuclear power plants and certain other facilities was transferred to the Nuclear Regulatory Commission from the AEC. Under Title I of that Act, control of and regulatory authority for AEC production facilities, as well as other functions, was transferred to the Energy Research and Development Administration. That Act explicitly created within ERDA the position of Assisuant Administrator for Environment and Safety. P. L. 93-438 § 101(d). Congress did not intend for the person appointed to that position to be limited to oversight of radiological health and safety alone. Congress intended for that person "to ensure the establishment and enforcement of appropriate health, public safety and environmental protection standards *for all activities of the agency*." S. Rep. 93-980, 1974 U.S. Cong. and Admin. News 5470, 5492 (1974). At present, DOE's Assistant Secretary for Environment, Safety and Health, Mary L. Walker, is heir to those statutory obligations and authorities.

Later, on August 4, 1977, Congress enacted the Department of Energy Organization Act which transferred the functions of the Energy Research and Development Administration to the newly created Department of Energy. P. L. 95-91, 91 Stat. 565 (1977). 42 U.S.C. 7100 *et seq.* Accordingly, those functions vested by law in the AEC and transferred to the Administrator of the Energy Research and Development Administration and the authorities vested in the Administrator of Energy Research and Administration and his subordinates by P. L. 93-938, were vested in the Secretary of Energy. 42 U.S.C. 7151. It is

under this authority that the Department of Energy, through DOE Orders 5481, 5482, and 5483, has promulgated comprehensive radiological and nonradiological standards applicable to its contractor operated facilities. These Orders, governing Safety Analysis and Review, DOE's Environmental Protection Safety and Health Protection Program, and the Occupational Safety and Health Program for DOE Contractor Employees At Government-Owned Contractor-Operated Facilities, are but the latest in an unbroken line of comprehensive safety requirements through which the Department of Energy and its predecessors have fully occupied the field of occupational health and safety regulation at federally owned or controlled facilities under their jurisdiction dating back to 1943. Through Order 5483, DOE regulates the configuration of scaffolding at those facilities.

APPENDIX I

4121-3-20 *ADDITIONAL AWARDS BY REASON OF VIOLATIONS OF SPECIFIC SAFETY REQUIREMENTS.*

(A) An application for an additional award of compensation founded upon the claim that the injury, occupational disease, or death resulted from the failure of the employer to comply with the specific requirement for the protection of health, lives, or safety of employees, must be filed, in duplicate, with the Industrial Commission, within two years of the injury, death, or inception of disability due to occupational disease. In death claims, the application shall be on "Form C-9" and in nonfatal cases, the application shall be on "Form C-8". Such applications should set forth the facts which are basis of the alleged the violation and shall cite the section or sections of the law or code of specific safety requirements which it is claimed have been violated. Such applications shall contain the claim number assigned by the bureau to the claim for compensation or benefits under chapter 4123. of the Revised Code.

(1) CLAIMANT OR HIS REPRESENTATIVE MAY SUBMIT AN AMENDMENT OF HIS APPLICATION FOR ADDITIONAL AWARD FOR VIOLATION OF A SPECIFIC SAFETY REQUIREMENT BEYOND THE EXPIRATION OF TWO YEARS FOLLOWING THE DATE OF INJURY, DISABILITY OR DEATH. ANY SUCH AMENDMENT MUST BE SUBMITTED WITHIN THIRTY DAYS OF THE RECEIPT BY CLAIMANT OR HIS COUNSEL OF THE REPORT OF THE INVESTIGATION BY THE INDUSTRIAL COMMISSION INTO THE ALLEGED SAFETY VIOLATION. CLAIMANT OR HIS COUNSEL MAY REQUEST AN EXTENSION OF THIS PERIOD FOR AN ADDI-

TIONAL THIRTY DAYS. SUCH REQUEST MUST BE SUBMITTED IN WRITING WITHIN THE ORIGINAL THIRTY DAY PERIOD. IF PROPERLY SUBMITTED THE INDUSTRIAL COMMISSION SHALL NOTIFY BOTH PARTIES AND THEIR REPRESENTATIVES OF THE GRANTING OF SUCH REQUEST BY MAIL. SUCH AMENDMENT SHALL SET FORTH ALL SPECIFIC SAFETY REQUIREMENTS OMITTED FROM APPLICATION MADE PRIOR TO THE EXPIRATION OF THE TWO YEAR PERIOD WHICH CLAIMANT BELIEVES WERE THE CAUSE OF THE INJURY, DISEASE OR DEATH, BUT WHICH WERE OMITTED BY REASON OF MISTAKE OR INCOMPLETENESS. COPIES OF ANY SUCH APPLICATION SHALL BE FORWARDED TO THE EMPLOYER AND ITS REPRESENTATIVES AS REQUIRED BY OAC 4121-3-20 (C). ANY SUCH AMENDMENT SHALL NOT RAISE ANY UNSTATED CLAIM, BUT SHALL MERELY CLARIFY A PREVIOUSLY ALLEGED VIOLATION.

(2)(a) ALL AMENDMENTS TO AN APPLICATION FOR ADDITIONAL AWARD FOR VIOLATION OF A SPECIFIC SAFETY REQUIREMENT FILED AFTER THE INVESTIGATION BY THE INDUSTRIAL COMMISSION SHALL BE REVIEWED TO DETERMINE IF THE AMENDMENT REQUIRES FURTHER INVESTIGATION.

(b) THE EMPLOYER OR ITS REPRESENTATIVE MAY OBJECT TO THE FILING OF AN AMENDMENT TO THE APPLICATION FOR ADDITIONAL AWARD FOR VIOLATION OF A SPECIFIC SAFETY REQUIREMENT BEYOND THE TWO YEAR PERIOD ON THE

GROUNDS THAT THE AMENDMENT RAISES A PREVIOUSLY UNSTATED CLAIM. IF SUCH OBJECTION IS FILED WITHIN THIRTY DAYS OF THE RECEIPT BY THE EMPLOYER OF THE AMENDMENT OR PRE-HEARING CONFERENCE, TO BE PROVIDED OVER BY A STAFF HEARING OFFICER SHALL BE SCHEDULED WITH PROPER NOTICE TO ALL PARTIES AND THEIR REPRESENTATIVES. THE PRE-HEARING CONFERENCE SHALL CONSIDER THE PROCEDURAL ISSUES RAISED BY THE AMENDMENT, AND IN PARTICULAR THE NEED FOR A RE-INVESTIGATION IF THE ORIGINAL INVESTIGATION WAS DONE PRIOR TO THE AMENDMENT.

(3) WHENEVER FURTHER INVESTIGATION IS PERFORMED BY THE INDUSTRIAL COMMISSION INTO AN ALLEGED SAFETY VIOLATION THE RECEIPT BY CLAIMANT OR HIS COUNSEL OF SUCH REPORT SHALL COMMENCE THE RUNNING OF A FURTHER PERIOD FOR SUBMISSION OF AMENDMENT OR NEW EVIDENCE AS IF THE RE-INVESTIGATION WERE THE FIRST INVESTIGATION.

(B) The commission may designate a staff hearing officer as a special referee to whom it may delegate such responsibilities as provided by law. The commission may assign personnel to assist such referee as required.

(C) Upon the filing of an application for an additional award with the commission, the commission shall send a copy of the application to the employer by certified mail, and to its authorized representatives by mail. The commission shall notify the employer that this application, if granted, will result in the employer being billed directly for the amount of the

award. The commission shall also notify the administrator by notifying the accounts section of the bureau of workers' compensation. The employer has thirty days in which to file an answer unless the time is extended, for good cause shown, by a staff hearing officer for a period not to exceed an additional thirty days.

(D) The commission may assign an application for such award for investigation or for hearing without investigation, if the application or answer raises legal issues the decision of which would dispose of the application. When an investigation has been made an an investigation report is completed, the commission shall mail a copy of such report to each of the parties and their authorized representatives. The commission shall advise each party that he has a designated period of time, not to exceed thirty days, in which to furnish additional proof that he may desire to offer or he may request a record hearing. WITHIN THIS PERIOD EITHER PARTY MAY REQUEST IN WRITING AN EXTENSION OF THE TIME WITHIN WHICH IT MAY SUBMIT ADDITIONAL PROOF. SUCH REQUESTS SHALL BE CONSIDERED BY A STAFF HEARING OFFICER AND, IF GRANTED, WRITTEN NOTICE OF THE EXTENSION, NOT TO EXCEED AN ADDITIONAL THIRTY DAYS, SHALL BE SENT TO BOTH PARTIES AND THEIR REPRESENTATIVES. ANY SUCH EXTENSION SHALL EXTEND THE TIME AVAILABLE FOR SUBMISSION OF ADDITIONAL PROOF EQUALLY TO BOTH PARTIES. If a record hearing is held, a stenographic transcript of any testimony offered shall be taken. The party requesting a record hearing shall pay for the stenographic services and shall submit a copy thereof for the claim file within thirty days of the hearing. Failure to file

a copy of the transcript of the proceedings within the thirty day period or within such an extended period as may be granted by the Staff hearing officer or by the industrial commission for good cause shown, shall not delay the rendering of the decision after the waiting period. If no request is made for such a hearing, no new evidence will be accepted at the hearing on the application. Within thirty days from the receipt of the investigation report, the claimant may amend his application to include any violation demonstrated by the investigation, but in no event more than two years from the date of injury.

(E) When new proof has been filed, or a request for a record hearing made, or the thirty-day period for the filing of new evidence has expired, the staff hearing officer shall review the file and the evidence, and determine the further course of action.

(1) If he determines that a record hearing is necessary as requested, he will make arrangements for the hearing and the issuing of subpoenas, if indicated. When he has received the transcript of the testimony, he shall send copies to the claimant and the employer (or to their representatives if they so designate).

(2) If no new proof has been filed, nor a request made for a record hearing and the thirty-day period, as provided in paragraph (D) above, has expired, the claim shall be set for hearing with notices to the parties, their representatives and the administrator, at which time the arguments in favor of and opposed to granting the application will be heard.

(3) If, at any time, the staff hearing officer determines further investigation is necessary, he will refer the claim for investigation requesting the specific date needed and notify the parties of the further investigation. When the supplemental investigation report

is in the file, copies are to be mailed to each of the parties and their authorized representatives.

(F) Following the hearing, the hearing officer shall reduce the recommended order to writing and submit it to the commission for its approval.

(1) If the commission approves the order, it shall adopt the order by vote of a majority of the commission and sign the order.

(2) If the commission does not approve the recommended order, it shall by a majority vote adopt such order as it deems appropriate.

(3) Copies of the order signed by the commission are to be mailed to all parties.

(G) Within thirty days of the receipt of the order of the commission deciding the issues presented by the application, either party has the right to file a motion requesting a rehearing, and furnish a copy to the opposing party. The opposing party has thirty days in which to file an answer.

(1) If the motion and answer are filed, a staff hearing officer, after the expiration of the answer time, shall review the same under the following criteria:

(a) In order to justify a rehearing of the commission's order, the motion shall be accompanied by new and additional proof not previously considered and relevant to the specific safety requirement violation.

(b) A rehearing may also be indicated in exceptional cases where the order was based on an obvious mistake of fact.

(2) If the motion for rehearing does not meet the criteria as outlined in paragraphs (G)(1)(a) and (G)(1)(b) preceding, the motion shall be denied without further hearing.

(3) If the motion for rehearing is granted, the staff hearing officer may:

(a) Set the claim for a hearing with notices on the merits of the application;

(b) Refer the claim for investigation and then set it for a hearing on the merits of the application.

(4) Following the hearing the staff hearing officer shall follow the same procedure pertaining to the recommended order as outlined in paragraph (F) of this rule. Such order, if approved by the commission, shall be final.

(5) The payment of the additional award shall be stayed during the pendency of the motion or rehearing.

(H) Settlements of violation applications shall be considered by the commission or its staff hearing officers either before the determination of the application or after it has been granted.

(1) Prior to the determination of the merits of the application.

(a) Joint application of the claimant and the employer on an agreed settlement shall be set for hearing before a staff hearing officer with notice to the parties but only after the investigation of the application has been made, unless in advance of the hearing a waiver of the notice of hearing has been filed by the parties. Thereafter, the staff hearing officer shall recommend to the commission action to be taken with regard to the settlement, and the commission shall issue its order approving or disapproving the settlement.

(b) When an application by the employer to settle its liability for the violation is made, the matter will be set for hearing before a staff hearing officer with notice to the claimant, the employer, their respective representatives and to the administrator of the bureau of workers' compensation. Following the hearing, the staff hearing officer shall recommend to the com-

mission action to be taken with regard to the settlement, and the commission shall issue its order approving or disapproving the settlement.

(2) Settlement after granting an additional award.

(a) Joint application of the claimant and the employer on an agreed settlement shall be handled in the same manner as provided in paragraph (H)(1)(a) of this rule.

(b) When an application is made by the employer to settle its future liability for the violation, the staff hearing officer shall obtain from the accounts section the information of whether all assessments under the finding and order of the commission have been paid. If not, the amount of these assessments must be added to any amount determined as the future liability of the employer. Thereafter, the matter will be set for hearing before a staff hearing officer with notice to the employer, the employer's representative, and the administrator of the bureau. Following the hearing, the staff hearing officer shall recommend to the commission action to be taken with regard to the settlement, and the commission shall issue its order approving or disapproving the settlement.

(I) EVERY ORDER ADJUDICATING AN APPLICATION FOR ADDITIONAL AWARD FOR VIOLATION OF A SPECIFIC SAFETY REQUIREMENT WHICH FINDS SUCH A VIOLATION AGAINST AN EMPLOYER STILL IN BUSINESS IN OHIO, INCLUDING EVERY ORDER WHICH DENIES SUCH AN AWARD BY REASON OF THE ABSENCE OF A PROXIMATE CAUSAL RELATIONSHIP BETWEEN THE VIOLATION AND THE INJURY, OCCUPATIONAL DISEASE, OR DEATH, SHALL DIRECT THAT THE VIOLATION BE CORRECTED WITHIN

A TIME PERIOD WHICH THE ORDER SHALL SPECIFY. COPIES OF ALL SUCH ORDERS SHALL BE FORWARDED TO THE PARTIES OF RECORD.

(1) THE INDUSTRIAL COMMISSION SHALL, AS SOON AS PRACTICAL AFTER THE EXPIRATION OF THE TIME PERIOD GRANTED TO THE EMPLOYER TO CORRECT THE VIOLATION, INVESTIGATE TO DETERMINE IF THE VIOLATION HAS BEEN CORRECTED. THE FILING OF AN APPLICATION FOR REHEARING SHALL NOT STAY THIS INVESTIGATION OR ANY OTHER PROCEEDINGS UNDER DIVISION *(I)* THROUGH *(K)* OF THIS RULE, EXCEPT THAT NO EMPLOYER SHALL BE REQUIRED TO PAY ANY PENALTY ASSESSED DURING THE PENDENCY OF ANY APPEAL FROM A FINDING OF A PENALTY.

(a) WHERE THE EMPLOYER, OR ANY OF HIS AGENTS OR EMPLOYEES, REFUSES OR OBSTRUCTS THIS INVESTIGATION THE INVESTIGATOR SHALL PROMPTLY INFORM THE INDUSTRIAL COMMISSION WHICH MAY TAKE ACTION APPROPRIATE UNDER THE CIRCUMSTANCES TO COMPEL THE EMPLOYER TO CO-OPERATE WITH THIS INVESTIGATION. IN THE EVENT THE INDUSTRIAL COMMISSION DETERMINES THAT SUCH ACTION IS APPROPRIATE, IT MAY INFORM THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE REFUSAL OR OBSTRUCTION OF THE EMPLOYER TOGETHER WITH A REQUEST THAT THE DIRECTOR OF INDUSTRIAL RELATIONS INVOKE HIS AUTHORITY UNDER SECTION 4101.05 OF THE REVISED CODE TO COMPEL THE EMPLOYER TO CO-OPERATE WITH THE INVESTIGATION. ANY REPORT

RESULTING FROM SUCH INVESTIGATION BY THE DEPARTMENT OF INDUSTRIAL RELATIONS, WHEN FORWARDED TO THE INDUSTRIAL COMMISSION, SHALL BE TREATED AS IF THE INDUSTRIAL COMMISSION HAS PREPARED IT FOR ALL PURPOSES UNDER THIS RULE.

(b) WHERE THE INVESTIGATION INDICATES THAT THE EMPLOYER HAS FAILED TO CORRECT THE VIOLATION WITHIN THE SPECIFIED TIME PERIOD THE INDUSTRIAL COMMISSION SHALL PROMPTLY FORWARD A COPY OF THE REPORT OF THE INVESTIGATION TO THE EMPLOYER, ITS REPRESENTATIVES IF ANY, AND THE DEPARTMENT OF INDUSTRIAL RELATIONS.

(J) THE INDUSTRIAL COMMISSION SHALL MAINTAIN A LIST OF APPLICATIONS FOR ADDITIONAL AWARD FOR VIOLATION OF A SPECIFIC SAFETY REQUIREMENT. IN EACH CASE WHERE TWO VIOLATIONS HAVE BEEN FOUND AGAINST THE SAME EMPLOYER WITHIN THE SAME TWENTY-FOUR MONTH PERIOD THIS INFORMATION SHALL BE FORWARDED TO THE DEPARTMENT OF INDUSTRIAL RELATIONS.

(K) WHEN THE COMMISSION IS NOTIFIED AS REQUIRED BY DIVISION *(I)* OR *(J)* OF THIS RULE THEY SHALL SEE THAT ALL STEPS NECESSARY AND APPROPRIATE FOR SCHEDULING THE REQUIRED HEARING ARE TAKEN.

(1) THE INDUSTRIAL COMMISSION MAY DESIGNATE A STAFF HEARING OFFICER TO SIT AS ITS DEPUTY IN DETERMINING WHETHER AN EMPLOYER HAS FAILED TO COMPLY WITH AN ORDER TO CORRECT A VIOLATION

OR WHETHER AN EMPLOYER HAS VIOLATED SPECIFIC SAFETY REQUIREMENTS MORE THAN ONCE IN THE SAME TWENTY-FOUR MONTH PERIOD.

(2) AN EMPLOYER WHO HAS FAILED TO COMPLY WITH A CORRECTIVE ORDER WITHIN THE SPECIFIED TIME SHALL BE DEEMED TO HAVE VIOLATED A SPECIFIC SAFETY REQUIREMENT FOR THE PURPOSES OF REVISED CODE 4121.47. SHOULD THE EMPLOYER COMPLY WITH THE CORRECTIVE ORDER WITHIN THE TIME SPECIFIED NO VIOLATION OF THIS SECTION WILL BE FOUND IN THE ABSENCE OF A PROXIMATE CAUSAL RELATIONSHIP BETWEEN THE VIOLATION AND THE INJURY, OCCUPATIONAL DISEASE, OR DEATH.

(3) AN EMPLOYER SHALL BE ASSESSED A CIVIL PENALTY WHEN TWO VIOLATIONS OF SPECIFIC SAFETY REQUIREMENTS OCCUR WITHIN THE SAME TWENTY-FOUR MONTH PERIOD UNDER THE FOLLOWING CIRCUMSTANCES:

(a) IF THE TWO VIOLATIONS OF SPECIFIC SAFETY REQUIREMENTS OCCUR AT THE SAME WORK PLACE, THE VIOLATIONS NEED NOT BE OF THE SAME TYPE OR KIND FOR A PENALTY TO BE ASSESSED. HOWEVER, IF THE TWO VIOLATIONS OF SPECIFIC SAFETY REQUIREMENTS OCCUR AT TWO DIFFERENT WORK PLACES OWNED, OPERATED, MANAGED, LEASED OR OTHERWISE CONTROLLED BY THE SAME INDIVIDUAL, COMPANY OR CORPORATION, THE VIOLATIONS MUST BE

FOR THE SAME SPECIFIC SAFETY REQUIREMENTS.

(b) A PENALTY SHALL NOT BE ASSESSED SOLELY FOR MULTIPLE VIOLATIONS WHICH CAUSED THE SAME INCIDENT, OR INCIDENTS WHERE MORE THAN ONE EMPLOYEE WAS INJURED OR KILLED.

(c) FOR THE PURPOSE OF DIVISION *(I)* THROUGH *(K)* OF THIS RULE: WORKPLACE SHALL MEAN ALL OF A SINGLE CONTIGUOUS FIXED SITUS UNDER THE CONTROL OF THE EMPLOYER WHERE WORK IS PERFORMED; OR, IF THE VIOLATION TOOK PLACE AT OR EN ROUTE TO OR FROM A WORK SITE TO WHICH THE EMPLOYER SENT EMPLOYEES TO PERFORM WORK BUT WHICH WAS NOT EXPECTED TO REMAIN INDEFINITELY UNDER THE CONTROL OF THE EMPLOYER, ANY WORK SITE OR TRAVEL ROUTE TO OR ALONG WHICH EMPLOYEES BASED OR SUPERVISED FROM THE SAME SITE HAVE BEEN SENT TO PERFORM WORK, INCLUDING SUCH BASE SITE.

(d) FOR THE PURPOSE OF DIVISION *(I)* THROUGH *(K)* OF THIS RULE: SAME SPECIFIC SAFETY REQUIREMENT SHALL MEAN THE IDENTICAL REQUIREMENT, BUT THIS EXCEPTION SHALL NOT PREVENT A PENALTY WHERE THE EMPLOYER IS FOUND TO HAVE VIOLATED THE PROVISIONS OF TWO REQUIREMENTS IN EFFECT FOR DIFFERENT PERIODS OF TIME WHICH COVER THE SAME MATTERS, EVEN THOUGH ONE OF

THE REQUIREMENTS IS STRICTER THAN THE OTHER.

(4) SETTLEMENT OF AN APPLICATION FOR ADDITIONAL AWARD FOR VIOLATION OF A SPECIFIC SAFETY REQUIREMENT PRIOR TO ADJUDICATION SHALL BE TREATED AS A FINDING OF NO VIOLATION FOR THE PURPOSE OF THIS RULE.

(5) NO PENALTY SHALL BE ASSESSED UPON AN EMPLOYER FOR VIOLATION OF MORE THAN ONE SPECIFIC SAFETY REQUIREMENT WITHIN THE SAME TWENTY-FOUR MONTH PERIOD UNLESS BOTH OF THE VIOLATIONS TOOK PLACE ON OR AFTER AUGUST 22, 1986.

(6) WHERE AN EMPLOYER IS FOUND TO HAVE VIOLATED SPECIFIC SAFETY REQUIREMENTS MORE THAN ONCE IN THE SAME TWENTY-FOUR MONTH PERIOD, THE EMPLOYER SHALL BE ASSESSED A CIVIL PENALTY APPROPRIATE IN LIGHT OF THE CIRCUMSTANCES OF THE INDIVIDUAL CASE IN AN AMOUNT NOT TO EXCEED $50,000.00. AMONG THE FACTORS THE INDUSTRIAL COMMISSION SHALL CONSIDER IN DETERMINING THE AMOUNT OF ANY SUCH CIVIL PENALTY ARE THE SIZE OF THE EMPLOYER AS MEASURED BY THE NUMBER OF EMPLOYEES, ASSETS AND EARNINGS OF THE EMPLOYER. IN ALL CLAIMS AS A CONSEQUENCE OF WHICH ANY CIVIL PENALTY IS FOUND THE EMPLOYER SHALL BE INELIGIBLE FOR THE REIMBURSEMENTS OTHERWISE PROVIDED FOR UNDER SECTION 4123.343, 4123.515 AND 4123.63 OF THE REVISED CODE.

(L) THE INDUSTRIAL COMMISSION SHALL REFER VIOLATION INFORMATION TO THE DEPARTMENT OF INDUSTRIAL RELATIONS WHEN AN EMPLOYER FAILS TO MAINTAIN A SAFE WORK ENVIRONMENT BY REPEATED OR PERSISTENT VIOLATIONS OF APPLICABLE SPECIFIC SAFETY REQUIREMENTS.

EFFECTIVE DATE: AUGUST 22, 1986

I HEREBY CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF RULE 4121-3-20.

/s/ ROBERT L. ROBBINS
ROBERT L. ROBBINS

PROMULGATED UNDER: R.C. CH. 119
RULE AUTHORIZED BY: R.C. SEC. 4121.13
RULE AMPLIFIES: R.C. SEC. 4121.46, R.C. SEC.4121.131 PURSUANT TO SECTION 35 OF ART. II OF THE OHIO CONSTITUTION, 4121.13, 4121.35, 4123.05.
PRIOR EFFECTIVE DATE: 10-17-68, 1-10-78, 11-26-79, 7-7-82

APPENDIX J

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

Dec. 7, 1973

Chairman Ray
Commissioner Larson
Commissioner Doub
Commissioner Kriegsman
Commissioner Anders

APPLICABILITY OF SECTION 4 (b)(1) OF THE OCCUPATIONAL SAFETY AND HEALTH ACT TO WORKING CONDITIONS OF AEC CONTRACTOR-EMPLOYEES WORKING IN GOVERNMENT-OWNED, CONTRACTOR-OPERATED FACILITIES

On December 29, 1970, the President signed into law the Occupational Safety and Health Act of 1970 (OSHA). The law became effective on April 28, 1971.

OSHA requires that every employer (any person engaged in a business affecting commerce who has employees) except the United States or any State or political subdivision of a State to "(1) furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees, and (2) . . . comply with occupational safety and health standards promulgated" by the Secretary of Labor in accordance with certain specified procedures. In this connection, the Secretary was required by April 28, 1973, to promulgate by rule as an occupational safety and health standard any national consensus standard and any established Federal standard unless he determines that the promulgation of such standard would not result in improved safety or health. Standards already issued under the Walsh-Healey

Public Contracts Act (41 U.S.C. §35), the Service Contract Act (41 U.S.C. §351), the Construction Safety Act (40 U.S.C. §333), the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §941), and the National Foundation on Arts and Humanities Act (20 U.S.C. §951), are also deemed occupational safety and health standards issued under OSHA until superseded by corresponding standards promulgated under OSHA.

Section 4 (b)(1) of OSHA provides that "[n]othing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

This section has been interpreted by both the Department of Labor and the Atomic Energy Commission as rendering the Act inapplicable to the working conditions of employees of AEC contractors and AEC licensees with respect to radiological occupational safety or health, or to Agreement State licensees with respect to the occupational radiological safety or health connected with "Agreement materials."

This interpretation is founded upon the Atomic Energy Commission's authority under section 161 (b) of the Atomic Energy Act of 1954, as amended, to prescribe and enforce radiological occupational health and safety. Section 161 (b) provides:

> "In the performance of its functions the Commission is authorized to...
>
> "b. establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property."

Section 4 (b)(1) can also be interpreted as rendering the Act inapplicable to the working conditions of AEC contractor-employees working in Government-owned, contractor-operated facilities with respect to which the Atomic Energy Commission prescribes or enforces occupational nonradiological safety or health standards or regulations. The Commission's authority to prescribe and enforce such nonradiological safety and health standards and regulations is based upon section 161 (i)(3) of the Atomic Energy Act of 1954, as amended. Section 161 (i)(3) provides:

> "In the performance of its functions the Commission is authorized to. . .
>
> "i. prescribe such regulations or orders as it may deem necessary . . . (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property."

In providing its views to the Joint Committee on Atomic Energy during Hearings on S. 3323 and H.R. 8862, the precursors of the Atomic Energy Act of 1954, as amended, Commissioner Joseph Campbell expressed the intent of the Atomic Energy Commission on the inclusion of section 161 (i) in the Act:

> "Section 161 (i) expressly gives the Commission authority to prescribe enforceable regulations and orders to . . . provide additional health and safety protection in connection with any activities authorized pursuant to the Act. This provision is essential to carry out the purposes of the Act." [Hearings before the Joint Committee on Atomic

Energy, 83d Cong., 2d Sess., June 2, 1954 at p. 601]

Section 161 (i)(3) thus authorizes the Commission to prescribe health and safety regulations for any activity authorized by the Act. This would include such activities as research and development relating to nuclear and nonnuclear processes; production and distribution of source material, special nuclear material, byproduct material, and atomic weapons; and regulation of production and utilization facilities and source material, special nuclear material and byproduct material. This subsection must be interpreted, moreover, as authorizing the Commission to prescribe enforceable nonradiological occupational health and safety regulations for such activities in view of the fact that section 161 (b) covers radiological occupational health and safety and Congress would not have attempted to cover precisely the same subject matter in two separate subsections of the same statutory section.

Since the Act's enactment on August 30, 1954, the Atomic Energy Commission has in fact prescribed and enforced comprehensive radiological and nonradiological occupational safety and health standards for those AEC contractor-employees working in its Government-owned, contractor-operated facilities. These standards are prescribed in the Atomic Energy Commission Manual and are currently found in AECM 0501, 0502, 0504, 0505, 0510, 0513, 0521, 0524, 0526, 0527, 0528, 0529, 0530, 0540, 0544, 0545, 0550, 0552, 0553, 0555 and 0560. These standards are specifically enforced by AEC in its contracts with those employers that operate or perform work for the AEC in Government-owned facilities. This is done through AEC's standard "safety, health and fire protection" clause:

> "The contractor shall take all reasonable precautions in the performance of the work under this contract to protect the health and safety of employees and of members of the public and to minimize danger from all hazards to life and property, and shall comply with all health, safety, and fire protection regulations and requirements (including reporting requirements) of the Commission. In the event that the contractor fails to comply with said regulations or requirements of the Commission, the Contracting Officer may, without prejudice to any other legal or contractual rights of the Commission, issue an order stopping all or any part of the work; thereafter a start order for resumption of work may be issued at the discretion of the Contracting Officer. The contractor shall make no claim for an extension of time or for compensation or damages by reason of or in connection with such work stoppage."

In view of the foregoing, it seems quite clear that section 4 (b)(1) renders OSHA inapplicable to the working conditions of AEC contractor-employees working in Government-owned or -leased, contractor-operated facilities as long as AEC continues to prescribe and enforce radiological and nonradiological occupational safety and health standards.

/s/ MARCUS A. ROWDEN
MARCUS A. ROWDEN
General Counsel

Jan. 2, 1974

Honorable Peter J. Brennan
Secretary of Labor

Dear Mr. Secretary:

We are pleased to learn from your letter of October 31 that you share our desire for an arrangement between our two agencies that will safeguard to the maximum possible extent the safety and health of contractor employees working in the Atomic Energy Commission's (AEC) government-owned or -leased (GOCO) establishments. We believe that we have established a means for implementing the respective responsibilities of the Department of Labor (DOL) and the AEC with respect to safety and health matters involving these employees that will use the government's resources in the most effective manner.

As you are aware, AEC is fully committed to a viable comprehensive occupational safety and health program at these GOCO facilities. This program involves regular AEC inspections and meaningful enforcement of both radiological and nonradiological occupational safety and health standards which are compatible with those prescribed by the Occupational Safety and Health Act of 1970 (OSHA). As a result, the occupational safety and health experience at these GOCO facilities is one of the best in the nation. In this connection, the latest National Safety Council survey of its members indicates that the all-industry frequency rate (the number of disabling injuries per million man hours worked) for 1972 was 10.17 while the all-industry severity rate (the number of days charged per disabling injury per million man hours worked) for 1972 was 655. This should be contrasted with the 1972 experience in AEC's GOCO facilities of a 1.33 frequency rate and a 411 severity rate.

We have sought to continue this program in such a manner as to achieve maximum worker protection with minimum duplication of effort. After numerous discussions between our respective staffs, it has become clear that the most

effective way to achieve these objectives is for AEC to assert its express statutory authority in this area and apply section 4(b)(1) of OSHA. Enclosed herewith is an opinion of the General Counsel of the Commission which provides the legal basis for this course of action (Enclosure 1). This opinion has been adopted by the Commission as an official AEC position.

Therefore, in order to accomplish the common desires of our two agencies, we will continue to prescribe and enforce occupational radiological and nonradiological safety and health standards for AEC contractor employees working in GOCO facilities. You will note from our implementing directive (Enclosure 2), that AEC is prescribing and enforcing OSHA standards in connection with this program.

It is our understanding that the Letter of Understanding executed on May 11, 1964, with respect to the delineation of responsibility between AEC and DOL as to the enforcement of the Walsh-Healey Public Contracts Act in GOCO facilities (Enclosure 3) shall continue in effect.

Sincerely,

Signed
/s/ DIXY LEE RAY
Chairman

Enclosures:
1. Memo to Commission from Marcus A. Rowden, General Counsel, dtd.12/7/73 (copy)
2. IAD - Sub: Occupational Safety and Health Program Applicable to AEC Contractor-Operated, Government-Owned or -Leased Fac.
3. Letter of Understanding, dtd. 5/11/64 (copy)

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON
Feb. 4, 1974

Honorable Dixy Lee Ray
Chairman
U. S. Atomic Energy Commission
Washington, D. C. 20545

Dear Madam Chairman:

This is in response to your letter of January 2, 1974, in which you assert that the Atomic Energy Commission possesses and exercises express statutory authority, which by operation of law under the terms of section 4(b)(1) of the Williams-Steiger Occupational Safety and Health Act of 1970 (OSHA), would preclude the application of OSHA to working conditions of private AEC contractors performing contractual operations in facilities owned or leased by the AEC.

Among other documents, you enclosed in your letter a memorandum of law signed by the AEC General Counsel, Mr. Marcus Rowden, in which he developed the AEC's interpretation that the Atomic Energy Act of 1954, as amended, precluded the application of OSHA as I described it in the paragraph above. Mr. Rowden relies principally on section 161(i)(3) of the 1954 AEC Act which provides:

> In the performance of its functions the Commission is authorized to . . .
>
> (i) prescribe such regulations or orders as it may deem necessary . . .(3) to govern any activity authorized pursuant to the Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of

> such activity, in order to protect health and minimize danger to life or property.

Mr. Rowden included some legislative history plus arguments that the above section makes it clear in the Commission's view that section 4(b)(1) of OSHA by operation of law renders OSHA inapplicable to the working conditions of AEC contractor employees working in Government-owned or -leased contractor operated facilities as long as, and to the extent that, AEC prescribes and enforces both radiological and nonradiological occupational safety and health standards.

We requested the legal memorandum from the AEC General Counsel for the fundamental and critical reason that the Department of Labor possesses no authority to interpret the provisions of statutes administered and enforced by other agencies, or conversely and more specifically, that the AEC has the primary responsibility and prerogative of interpreting the terms of the Atomic Energy Act of 1954, as amended, which it enforces and administers.

While we lack the authority to interpret the AEC statute we may, of course, make a judgment in this matter as it relates to section 4(b)(1) of OSHA. In our judgment the AEC General Counsel's memorandum is a clear and reasoned presentation of your agency's interpretation of the germane provision of the Atomic Energy Act. We accept the conclusion reached in the memorandum of the AEC General Counsel that section 161(i)(3) of the Atomic Energy Act of 1954, as amended, would, as interpreted by Mr. Rowden, preclude the application of OSHA by operation of law under the terms of section 4(b)(1) of OSHA to the extent that the AEC issues safety and health standards and enforces those standards under its contractual authority pursuant to the AEC statute.

I note that in your regulations contained in the Immediate Action Directive, dated December 20, 1973, you include OSHA Construction Safety Standards (29 CFR Part 1926).

We assume that AEC would enforce these standards as to that type of construction activity which would be performed in already occupied AEC-owned or -leased facilities, but would not enforce these standards in the case of construction activity conducted in initial construction of the facility to be owned or to be leased by AEC after the construction. My assumption is based on the fact that initial construction activity is not related to the uses to which the facility will later be put by the AEC-GOCO contractors. Therefore, such initial construction activity is not within the ambit of your interpretation of the AEC statutory authority. If my assumption is not in accord with your views, please let me know. However, my raising this question does not affect our understanding of the AEC General Counsel as to the nonapplication of OSHA to the other GOCO operations which I have already fully discussed.

Again, in an effort to reply to you as quickly as possible without raising delaying issues, I would agree that the former Labor Department-AEC agreement as to Walsh-Healey cooperation is still essentially viable. We must, however, bring the former agreement up to date in order to reflect changes brought about by the enactment of OSHA. This new version of the former agreement involves only minor technical changes, so I will not hold up my response because of minor legal matters that can be handled later between our respective legal staffs.

Before closing, I would also request that you furnish us with a list specifying all AEC-GOCO contractors to whose working conditions OSHA does not apply under the terms of your interpretation of the AEC Act. Unless we have such a list, we cannot ascertain the parameters of the jurisdiction you assert for AEC.

Sincerely,

/s/ PETER J. BRENNAN
Secretary of Labor

UNITED STATES

ATOMIC ENERGY COMMISSION

Washington D.C. 20545

May 14, 1974

Heads of Divisions and Offices, HQ
Managers of Field Offices
Managers of PNR and SNR
THROUGH: Director, Division of Naval Reactors, HQ

GOCO FACILITIES .

Enclosed is a list of GOCO facilities over which the AEC will continue to exercise statutory authority for occupational safety and health. The Division of Operational Safety (OS) recommends that managers of field offices review this list and determine, in accordance with IAD 0504-33 D.3.a., if additional facilities should be included. If you determine that other facilities should be included, please submit your additions, along with justifications, to OS by June 3, 1974. It should be noted that offices which have only Federal employees are not included in the list. These facilities come under Section 19 of the Occupational Safety and Health Act and are governed by AECM 0507.

For those facilities which are not to be added to the enclosed GOCO list, OS recommends that managers of field offices initiate the necessary action toward removing the health and safety clause (AECPR 9-7.5006-47) from the applicable contracts. Generally, it is expected that small offsite AEC contract activities will be conducted in accord with appropriate state or U.S. Department of Labor occupational safety and health regulations and the radiological safety will be subject to AEC or state licensing. In some cases it may be necessary to give special consideration to modifying the health and safety contract clause to cover radiological safety for AEC contractors that op-

erate AEC-owned radiation producing equipment in states that do not have radiation safety programs. Offsite facilities using source, special nuclear, or byproduct materials, which have been specifically exempted from AEC or state licensing, should also use a modified safety clause covering only radiological safety.

In general, support contractors (i.e., construction, architect-engineers, services, etc.), are not listed. It is intended, however, that when working at the listed facilities, such contractors would also be covered by IAD 0504-33. Thus, the standard clause (AECPR 9-7.5006-47) should continue to be used in these contracts.

If there are questions concerning this matter, please contact David E. Patterson of my staff.

/s/ MARTIN B. BILES
MARTIN B. BILES, Director
Division of Operational Safety

Enclosure:
GOCO List

California

1. a. Lawrence Berkeley Laboratory, University of California Berkeley

   b. Donner Laboratory, University of California Berkeley

   c. Chemical Biodynamics Laboratory, University of California Berkeley

   Principal Contractor:
   University of California
   Berkeley, California 94720

2. a. Lawrence Livermore Laboratory, University of California
   End of East Avenue
   Livermore

   b. Lawrence Livermore Laboratory -- Site 300
   17 miles east of Livermore on Corral Hollow Road
   Livermore

   Principal Contractor:
   University of California
   P.O. Box 808
   Livermore, California 94550

3. Sandia Laboratories, Livermore
   End of East Avenue
   Livermore

   Principal Conractor:
   Sandia Laboratories
   Livermore, California 94550

4. a. Liquid Metal Engineering Center
   AEC Triangle at Santa Susana
   Canoga Park

   b. Liquid Metal Engineering Center
   Two AEC-owned buildings, total about

5000 feet², outside AEC triangle
Canoga Park

Principal Contractor:
Atomics International
P.O. Box 1449
Canoga Park, California 91304

5. Stanford Linear Accelerator Center
2572 Sand Hill Road
Menlo Park

Principal Contractor:
Stanford University
P.O. Box 4349
Stanford, California 94305

6. 2801 Old Crow Canyon Road
San Ramon

Principal Contractor:
EG&G, Inc.
P.O. Box 204
San Ramon, California 94583

Colorado

1. Rocky Flats Plant
25 miles northwest of Denver -- Highway 93
Between Boulder and Golden

Principal Contractor:
Dow Chemical USA
P.O. Box 888
Golden, Colorado 80401

2. AEC Compound
Grand Junction

Principal Contractor:
Lucius Pitkin, Inc.

P.O. Box 1889
Grand Junction, Colorado 81501

Connecticut

1. Knolls Atomic Power Laboratory
Windsor Site
Windsor

Principal Contractor:
General Electric Company
P.O. Box 545
Windsor, Connecticut 06095

Florida

1. Pinellas Plant
5 miles southeast of Largo on Bryan Dairy and Belcher Roads
St. Petersburg

Principal Contractor:
General Electric Company
P.O. Box 11508
St. Petersburg, Florida 33733

Hawaii

1. a. 531 Ohohia Street
Honolulu, Oahu

b. Trailer Complex and Warehouse (T-3059)
Hickam Air Force Base
Honolulu, Oahu

c. Assembly Building and Warehouse
Barber's Point
Naval Air Station, Oahu

d. Transmitter Station
Mauna Kapu, Oahu

Principal Contractor:
Holmes & Narver, Inc.
P.O. Box 9186
Honolulu, Hawaii 96820

2. Sandia Laboratories
Barking Sands, Kauai

Principal Contractor:
Sandia Laboratories
P.O. Box 478
Waimea, Kauai, Hawaii 96796

3. Communications and Scientific Station
Haleakala, Maui

Principal Contractor:
Sandia Laboratories
Pacific Area Support Office
P.O. Box 9186
Honolulu, Hawaii 96820

Idaho

1. National Reactor Testing Station
40 miles west of Idaho Falls on U.S. Highway 20

Principal Contractors:

Aerojet Nuclear Company 550 Second Street Idaho Falls, Idaho 83401	Allied Chemical Corporation 550 Second Street Idaho Falls, Idaho 83401
Argonne National Laboratory P.O. Box 2528 Idaho Falls, Idaho 83401	Westinghouse Electric Corp. P.O. Box 2068 Idaho Falls, Idaho 83401

2. a. 550 Second Street and Annex
Idaho Falls

b. Second and third floors of Rogers Building
478 Shoup Avenue
Idaho Falls

c. Computer Science Center
1155 Foote Drive
Idaho Falls

d. Monte Wight Building
500 Block West Broadway
Idaho Falls

Principal Contractor:
Aerojet Nuclear Company
550 Second Street
Idaho Falls, Idaho 83401

Illinois

1. Argonne National Laboratory
9700 South Cass Avenue
Argonne

Principal Contractor:
Argonne University Association
P.O. Box 307
Argonne, Illinois 60439

2. National Accelerator Laboratory
Off Kirk Road on west boundary
Batavia

Principal Contractor:
University Research Associates, Inc.
2101 Constitution Avenue
Washington, D.C. 20037

Iowa

1. Ames Laboratory, Iowa State University
Reactor Building -- Scholl Road

Physics Addition Building
Lab & Office Building
Spedding Hall -- Spammell Drive
Metallurgy Building -- Spammell Drive
Metals Development -- Spammell Drive
Warehouse Building -- Maintenance Area
Mechanical Maintenance -- Maintenance Area
Painting & Air Conditioning Shops -- Maintenance Area
Ames

Principal Contractor:
Iowa State University
Ames, Iowa 50010

2. Burlington Plant
(Part of Iowa Army Ammunition Plant) 10 miles west of Burlington on U.S. Highway 34
Burlington

Principal Contractor:
Mason & Hanger -- Silas Mason Co., Inc.
P.O. Box 561
Burlington, Iowa 52601

Kentucky

1. Paducah Gaseous Diffusion Plant
Paducah

Principal Contractor:
Union Carbide Corporation
P.O. Box 1410
Paducah, Kentucky 42001

Maryland

1. Headquarters Building
Germantown

Principal Contractor:
Westinghouse Management Systems and Services
c/o U.S. Atomic Energy Commission
Washington, D.C. 20545

2. Rockville Virus Laboratory
5640 Fisher Lane
Rockville

Principal Contractor:
Oak Ridge National Laboratory
5640 Fisher Lane
Rockville, Maryland 20852

Massachusetts

1. Laboratory of Nuclear Science
Middleton

Principal Contractor:
Massachusetts Institute of Technology
77 Massachusetts Avenue
Cambridge, Massachusetts 02139

Missouri

1. Kansas City Plant
Bannister Road & Troost
Kansas City

Principal Contractor:
The Bendix Corporation
P.O. Box 1159
Kansas City, Missouri 64141

2. Weldon Springs Retention Basin and Quarry
Off U.S. Highway 70 west
Weldon Springs

Principal Contractor:
National Lead Company of Ohio
P.O. Box 39158
Cincinnati, Ohio 45329

Nevada

1. Nevada Test Site
Mercury

Principal Contractor:
Reynolds Electrical & Engineering Co., Inc.
P.O. Box 14400
Las Vegas, Nevada 89114

2. Tonopah Test Range
47 miles southeast of Tonopah
Tonopah

Principal Contractor:
Sandia Laboratories
P.O. Box 871
Tonopah, Nevada 89049

3. 680 East Sunset Road
6367 Escondido Road
Las Vegas

Principal Contractor:
EG&G, Inc.
P.O. Box 1912
Las Vegas, Nevada 89101

4. 2501 Wyandotte Street
2300 West Rancho Drive, Suite 216
3084 South Highland Drive, Buildings 6, 7, 8
Las Vegas

Principal Contractor:
Reynolds Electrical & Engineering Co., Inc.

P.O. Box 14400
Las Vegas, Nevada 89114

New Jersey

1. Princeton Plasma Physics Laboratory
"C" Site on the Forrestal Campus
Princeton

Principal Contractor:
Princeton University
P.O. Box 682
Princeton, New Jersey 08540

New Mexico

1. a. Sandia Laboratories
Kirtland Air Force Base -- East (KAFB)
Albuquerque

b. 2511 San Mateo, N.E.
Albuquerque

Principal Contractor:
Sandia Laboratories
P.O. Box 5800
Albuquerque, New Mexico 87115

2. Inhalation Toxicology Research Institute
KAFB -- East, Albuquerque

Principal Contractor:
Lovelace Foundation
Building 9200, Area Y
KAFB -- East
Albuquerque, New Mexico 87115

3. EG&G Operations
KAFB -- West, NC-135 Area, Albuquerque

Principal Contractor:
EG&G Inc.

c/o NVOO Site Manager
KAFB
P.O. Box 4339
Albuquerque, New Mexico 87106

4. Los Alamos Scientific Laboratory
Los Alamos

Principal Contractor:
University of California
P.O. Box 1663
Los Alamos, New Mexico 87544

5. 1100 4th Street
Los Alamos

Principal Contractor:
EG&G Inc.
P.O. Box 809
Los Alamos, New Mexico 87544

6. 901 Trinity Drive
Los Alamos

Principal Contractor:
The ZIA Company
901 Trinity Drive
Los Alamos, New Mexico 87544

New York

1. Brookhaven National Laboratory
Off William Floyd Parkway
Upton

Principal Contractor:
Associated Universities, Inc.
Upton, New York 11973

2. Knolls Atomic Power Laboratory
River Road
Niskayuna

Principal Contractor:
General Electric Company
P.O. Box 1072
Schenectady, New York 12301

3. Knolls Atomic Power Laboratory
Kesselring Site
West Milton

Principal Contractor:
General Electric Company
P.O. Box 1072
Schenectady, New York 12301

4. Niagara Falls Boron Plant
Model City

Principal Contractor:
National Lead Company of Ohio
P.O. Box 39158
Cincinnati, Ohio 45329

Ohio

1. Portsmouth Gaseous Diffusion Plant
Off Highway U.S. 23
Piketon

Principal Contractor:
Goodyear Atomic Corporation
P.O. Box 628
Piketon, Ohio 45661

2. Mound Laboratory
Miamisburg

Principal Contractor:
Monsanto Research Corporation
P.O. Box 32
Miamisburg, Ohio 45342

3. Feed Materials Production Center
6 miles north of Cincinnati -- off Highway U.S. 50 bypass west
Fernald

Principal Contractor:
National Lead Company of Ohio
P.O. Box 39158
Cincinnati, Ohio 45239

Pennsylvania

1. Bettis Atomic Power Laboratory
West Mifflin

Principal Contractor:
Westinghouse Electric Corporation
P.O. Box 79
West Mifflin, Pennsylvania 15122

2. Shippingport Nuclear Power Station
Shippingport

Principal Contractor:
Duquesne Light Company
P.O. Box 57
Shippingport, Pennsylvania 15077

South Carolina

1. Savannah River Plant
18 miles south of Aiken on State Route 125
Aiken

Principal Contractor:
E. I. du Pont De Nemours and Company
Aiken, South Carolina 29801

Tennessee

1. Oak Ridge National Laboratory
Bethel Valley Road, about 12 miles from Oak Ridge
Oak Ridge

Principal Contractor:
Union Carbide Corporation
P.O. Box X
Oak Ridge, Tennessee 37830

2. Y-12 Plant
Bear Creek Road, about 1.5 miles from Oak Ridge
Oak Ridge

Principal Contractor:
Union Carbide Corporation
P.O. Box Y
Oak Ridge, Tennessee 37830

3. Oak Ridge Gaseous Diffusion Plant
Oak Ridge Turnpike, about 8 miles from Oak Ridge
Oak Ridge

Principal Contractor:
Union Carbide Corporation
P.O. Box P
Oak Ridge, Tennessee 37830

4. Comparative Animal Research Laboratory
1299 Bethel Valley Road
Oak Ridge

Principal Contractor:
University of Tennessee
P.O. Box 1071
Knoxville, Tennessee 37901

5. Tulane Avenue – New Museum
Tyrone Road – Wing D -- Hospital (Cancer Research)
Jefferson Road -- Old Museum

South Illinois -- Teacher Training Building
Warehouse Road -- Training Facility
Oak Ridge

Principal Contractor:
Oak Ridge Associated Universities
P.O. Box 117
Oak Ridge, Tennessee 37830

6. Warehouse Road
Oak Ridge

Principal Contractor:
The Rust Engineering Company
P.O. Box 587
Oak Ridge, Tennessee 37830

7. 800 Oak Ridge Turnpike
Oak Ridge

Principal Contractor:
Union Carbide Corporation
P.O. Box Y
Oak Ridge, Tennessee 37830

Texas

1. Pantex Plant
21 miles northeast of Amarillo, 2 miles north of U.S.
Highway 60
Amarillo

Principal Contractor:
Mason & Hanger -- Silas Mason Co., Inc.
P.O. Box 647
Amarillo, Texas 79177

Washington

1. a. Hanford Project Site
North Stevens Drive

b. Richland Operations Office
Federal Building
725 Jadwine Avenue

c. 700 Area Facilities -- Richland
A. 703 Building -- Knight Street
B. 712 Building -- Northgate Drive
C. 747 Building -- Knight Street
D. 748 Building -- Swift Street
E. Medical-Dental Building -- Swift Street

Principal Contractors:

Atlantic Richfield
Hanford Co.
P.O. Box 250
Richland, Washington 99352

Battelle-Pacific Northwest
Laboratory
P.O. Box 999
Richland, Washington 99352

Hanford Engineering Development Lab.
P.O. Box 1970
Richland, Washington 99352

United Nuclear Industries, Inc.
P.O. Box 490
Richland, Washington 99352

Hanford Environmental Health Foundation
P.O. Box 100
Richland, Washington 99352

2. 801 First Street
Richland

Principal Contractor:
J. A. Jones Construction Company
801 First Street
Richland, Washington 99352

West Virginia

1. Reduction Pilot Plant
Center of International Nickel Complex
Huntington

Principal Contractor:
International Nickel Company
P.O. Box 384
Huntington, West Virginia 25708

Johnstown Island

1. Holmes & Narver Operations
Main Island

Principal Contractor:
Holmes & Narver, Inc.
P.O. Box 9186
Honolulu, Hawaii 96820

MOTION

No. 86-1172

Supreme Court, U.S.
FILED
MAR 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

GOODYEAR ATOMIC CORPORATION,

Appellant,

v.

STATE EX REL. ESTO MILLER,

Appellee.

On Appeal from the Supreme Court of Ohio

MOTION TO DISMISS OR AFFIRM

STEWART JAFFY & ASSOCIATES
Co., L.P.A.

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March 11, 1987

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or call collect (402) 342-2831

QUESTIONS PRESENTED

A. Did the Atomic Energy Act of 1954 preempt the Ohio constitutional provision (Article II, Section 35) permitting additional workers' compensation to be paid to an injured worker where a violation of a "specific requirement for the protection of the lives, health or safety of employees enacted by the General Assembly" or adopted by the Ohio Industrial Commission causes injury?

B. Does the Ohio constitutional provision providing for additional compensation to injured workers where the injury is caused by a violation of a specific safety requirement, regulate the Goodyear Atomic Corporation, Portsmouth Gaseous Diffusion Plant?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE MOTION	2
COUNTERSTATEMENT OF THE CASE	3
ARGUMENT	5
CONCLUSION	16
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
Hayfield Northern Railroad Company, Inc. v. Chicago and North Western Transportation Company (1984), 467 U.S. 622, 104 S. Ct. 2610, 81 L. Ed.2d 527	10
Hillsborough County, Florida v. Automated Medical Laboratories, Inc. (1985), 471 U.S. 707, 105 S. Ct. 2371, 85 L. Ed.2d 714	11
Industrial Fabricators, Inc. v. The Industrial Commission of Ohio, U.S. District Court, Southern District, Case No. C-2-77-119, dated October 3, 1979	7
Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board (1984), 467 U.S. 461, 104 S. Ct. 2518, 81 L. Ed.2d 399	9
New York Telephone Company v. New York State Department of Labor (1979), 440 U.S. 519	10, 11
Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973)	15
Pacific Gas & Electric Company v. State Energy Resource Conservation and Development Commission (1983), 461 U.S. 190	13, 14
Pacific Gas & Electric Company v. State Energy Resource Conservation and Development Commission (9th Cir., 1981) 659 F.2d 903	14
Rice v. Santa Fe Elevator Corp. (1947), 331 U.S. 218	11
Silkwood v. Kerr-McGee Corporation, 464 U.S. 238, 78 L. Ed.2d 443, 104 S. Ct. 615 (1984)	8, 13
State, ex rel. Bailey v. Krise (1969), 18 Ohio St. 2d 191	5, 8

TABLE OF AUTHORITIES—Continued

Pages

State, ex rel. Emmich v. Ind. Comm. (1947), 148 Ohio St. 658 5

State, ex rel. Engle v. Industrial Commission, 142 Ohio St. 425 (1944) 8

State, ex rel. Kroger Company v. Ind. Comm. (1980), 62 Ohio St. 2d 4 ..... 6, 7

CONSTITUTIONAL PROVISIONS:

Ohio Constitution, Article II, Section 28 2

Ohio Constitution, Article II, Section 35 ..... 1, 4. 5, 6

STATUTES:

28 U.S.C. § 1445(c) 15

29 U.S.C. § 653(4) 7

42 U.S.C. § 2011 ..... 8, 11

42 U.S.C. § 2014(v) 12

42 U.S.C. § 2018 14

42 U.S.C. § 2021 12

42 U.S.C. § 2021(b) 12

42 U.S.C. § 2021(c) 12

42 U.S.C. § 2021(k) 13, 14

42 U.S.C. § 2061 ..... 11, 12

42 U.S.C. § 2061(b) 11

Ohio Revised Code Section 4121.47 ..... 2, 3

TABLE OF AUTHORITIES—Continued

Pages

OTHER AUTHORITIES:

Annotation: State Regulation of Nuclear Power Plants, 82 ALR 3d 751 14

Ohio Administrative Code Provision 4121:1-3-03(D)(2) 4

Ohio Administrative Code Provision 4121-3-20 ..... 2, 3

INTRODUCTION

Claimant, Esto Miller, an Employee of the Goodyear Atomic Corporation, was injured July 30, 1980.

He fell from a manually propelled mobile work platform or scaffold known as a "high horse ladder stand."

He was paid workers' compensation under the Ohio Law. The Employer is subject to the Ohio Workers' Compensation Law and pays premiums for coverage. He filed an Application for an additional workers' compensatior. award for violation of a specific safety requirement adopted by the Ohio Industrial Commission. The specific safety requirement is adopted pursuant to Ohio Constitution, Article II, Section 35 (Appendix 1).

If the Ohio Industrial Commission ruled in his favor by finding that a violation of the safety requirement occurred and that it caused the injury, it would award additional workers' compensation to Esto Miller.

Under the Ohio Constitution, Esto Miller would receive no less than 15% of the maximum workers' compensation award paid to him and no more than 50% of such industrial compensation.[1] In actual dollars, Miller could receive, if the Commission ruled in his favor, no less than $1,328.00 and no more than $4,429.00.

---

[1] Miller was paid a total of $9,000.00 workers' compensation (Brief of Appellant, page 9). Twenty-nine weeks were paid at $258.00 a week, sixteen weeks were paid at $86.00 a week. Under the additional safety award, the maximum (50% rate) he could receive is twenty-nine weeks at $129.00 and sixteen weeks at $43.00, for a total of $4,429.00. the minimum (at 15%) would be twenty-nine weeks at $38.70 and sixteen weeks at $12.90, for a total of $1,328.00.

The Commission made no ruling on the merits. It believed that it was preempted by Federal Law. The Ohio Court of Appeals and later the Ohio Supreme Court, on August 20, 1986, held there was no preemption.

Appellant has cited and attached in its Appendix Ohio Revised Code Section 4121.47. That Section of the law became effective August 22, 1986. It has no application to this case, which is governed by the law in effect in 1980 when Claimant was injured. There was no prior law of similar import. Appellant has attached as its Appendix I attached Ohio Administrative Code Provision 4121-3-20. That provision did not become effective until August 22, 1986. Neither Ohio Revised Code Section 4121.47 nor the Administrative Code Provision 4121-3-20 have application to this case because Article II, Section 28 of the Ohio Constitution prohibits retroactive laws.

It should be noted that Appellant makes no claim that the Ohio Industrial Commission will act on the basis of the new Ohio Revised Code Section 4121.47, or on the basis of the new Ohio Administrative Code Provision 4121-3-20.

———o———

STATEMENT OF THE MOTION

Comes now the Appellee, Esto Miller, and pursuant to Supreme Court Rule 16B, moves this Court to dismiss the Appeal of the Appellant for the following reasons:

1. The Appeal is not within the jurisdiction of the Supreme Court of the United States because there is no substantial federal question.

2. If Appellant bottoms its case on Ohio Revised Code Section 4121.47 and Ohio Administrative Code Provision 4121-3-20, there is no current case and controversy since that Law and the Ohio Administrative Code Provision were not in effect and do not apply to this case.

In the alternative, the Decision of the Ohio Supreme Court should be affirmed since the decision of the federal question involved is so unsubstantial as to need no further argument.

———o———

COUNTERSTATEMENT OF THE CASE

The specific job Esto Miller was performing did not involve a nuclear or radiological hazard. The specific work he was doing is not covered by the Federal Nuclear Regulatory Act or the Federal Code of Regulations.

As he attempted to lower the guardrail on the scaffold, his glove caught on a bolt which was protruding from an exposed surface of the guardrail. As the guardrail swung forward, it pulled the Claimant off the platform, causing him to fall approximately six and one-half feet to a concrete floor. His fall resulted in a fracture to his left ankle and an injury to his left heel.

Mr. Miller was working for Goodyear at a nuclear production facility owned by the United States Government. Goodyear operates that facility pursuant to a contract with the U.S. Department of Energy. Under that contract, Goodyear is specifically required to:

> procure all necessary permits or licenses and *abide by all applicable laws, regulations, and ordinances* of the United States and *of the State, territory, and political subdivision in which the work under this contract is performed.*
>
> (Emphasis added.)

Goodyear is registered with the State of Ohio as a State Fund Employer (Risk No. 258953). As such, Goodyear is covered by and amenable to the workers' compensation laws of the State of Ohio. At no time has Mr. Miller filed a claim against the United States, the Department of Energy, or any other federal agency.

Mr. Miller's workers' compensation claim was fully certified by his employer and the claim was recognized for the injury sustained.

Thereafter, Esto Miller filed an application (sometimes hereafter called a "VSSR") for the safety violation award. The application alleged a violation of a specific safety requirement, Ohio Adm. Code § 4121:1-5-03(D)(2). This Section provides, in part, that "Exposed surfaces [on scaffolds] shall be free from sharp edges, burrs or other projecting parts."

The authority to award additional compensation (Article II, Section 35) does not permit the Industrial Commission to regulate any employer in this State. There is no provision for the Industrial Commission to force the employer to correct the safety violation. The State cannot fine the employer if it does not comply with the requirements. The employer is free to ignore the requirement. The provision merely allows additional workers' compensation to an employee injured as a result of a violation of the Administrative Code.

It was this VSSR application which resulted in the Mandamus suit in the Ohio Courts when the Ohio Industrial Commission decided it was preempted [Appendix C, Appellant's Brief].

The Ohio Supreme Court ruled:

> Nowhere in the Atomic Energy Act has Congress expressly preempted state authorities from applying workers' compensation safety requirements to protect workers at nuclear power plants against safety hazards unrelated to radiation. Similarly, the specific safety requirements embodied in Ohio workers' compensation law do not conflict with or frustrate the Atomic Energy Act of 1954 or its objectives.

—o—

ARGUMENT

1. THERE IS NO REGULATION INVOLVED.

In reviewing an additional award for violation of a specific safety requirement, the Ohio Supreme Court stated that the additional safety award is for the protection of the employee and is compensation as far as the employee is concerned. *State, ex rel. Emmich, v. Ind. Comm.* (1947), 148 Ohio St. 658.

In a later decision, *State, ex rel. Bailey, v. Krise* (1969), 18 Ohio St. 2d 191, the Ohio Supreme Court stated (pages 195-197):

> A review of the history of Section 35 of Article II of the Constitution is illuminating. Under the original form of Section 35, as adopted in 1912 an employee, by receiving an award for a compensable injury, was specifically not precluded from maintaining an action

at law for his employer's failure to comply with lawful requirements for the protection of the lives, health and safety of employees. (Citations omitted.)

The amendment of 1923 abolished this right and substituted the additional award from the state insurance fund. Since that time, Section 35, Article II has relieved employers from having to respond in damages for violations of specific safety requirements. In return, employees have relinquished their right to seek damages for those violations. Therefore, to construe Section 35 as relieving the employer of his common-law duty to respond in damages for violation of a safety requirement causing injury to its employee, and simultaneously of preventing the injured employee from receiving an additional award of compensation for that default of the employer, would be manifestly illogical and injust.

In that case the Industrial Commission refused to apply its Specific Safety Requirements upon an employer when the injury occurred in the State of Iowa. The Industrial Commission had argued that because of the penal nature of the award, Specific Safety Requirements could not be applied extraterritorially. The Court applied the requirements to the employer and concluded by stating:

> [t]he primary characteristic of Ohio's additional award for a violation of a specific safety requirement is compensatory, not penal.
>
> 18 Ohio St.2d at 198.

The additional award was enacted as additional compensation for the employee and was not designed as a regulation.

In a more recent decision of the Ohio Supreme Court, *State, ex rel. Kroger Company, v. Ind. Comm.* (1980), 62

Ohio St.2d 4, that court was faced with the argument by the employer that the Occupational Safety and Health Act of 1970 (OSHA) preempted any regulation of safety by the Industrial Commission through its VSSR awards. The employer in *Kroger, supra,* presented a two-fold argument. First, it argued that because OSHA regulates in the area, it preempts any other regulations by the State. Second, it argued that 29 U.S.C. § 653(4), which specifically excepts workers' compensation laws from any type of preemption, did not apply. It argued that the additional award for the violation of a specific safety requirement was not compensation but a regulation and, therefore, subject to preemption.

The Ohio Supreme Court rejected the employer's arguments and once again indicated that VSSR awards are primarily compensatory. The Court stated at page 6 of its decision:

> Although compensation is calculated with reference to some standard of employer's culpability, additional awards for violation of specific safety requirements are an integral part of the Ohio workers' compensation scheme. Thus, we find that such requirements have not been pree pted by federal law.

The United States District Court for the Southern District of Ohio has similarly found that the OSHA requirements do not preempt any awards made pursuant to a violation of the Specific Safety Requirement. In *Industrial Fabricators, Inc. v. The Industrial Commission of Ohio,* U.S. District Court, Southern District Case No. C-2-77-119 dated October 3, 1979 (Appendix 2). The District Court stated at page 4 of its decision:

> The history of Ohio's additional award provision indicates that it was meant to fully serve the purpose of compensation and also to supplant the employee's common law rights, pursuant to which he was entitled to seek punitive damages for gross or willful wrongdoing on the part of his employer. *State, ex rel. Engle, v. Industrial Commission,* 142 Ohio St. 425 (1944).

In *Silkwood v. Kerr-McGee Corporation,* 464 U.S. 238, 78 L.Ed.2d 443, 104 S.Ct. 615 (1984) it was quite clear that if, in fact, punitive damages were regulatory, the State would, in effect, be regulating a preempted matter. *Silkwood* involved nuclear materials and hazards and caused harm therefrom; the Esto Miller case does not involve any nuclear aspects causing harm. *Silkwood* would thus appear to have presented a more compelling case for preemption than the case at bar.

The Supreme Court in *Silkwood* reviewed the Atomic Energy Act of 1954 and its later amendments. Specifically, the Court reviewed the Price-Anderson Act, Pub. L. 85-256, 71 Stat. 576 (1957), an amendment to the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*

In reviewing this Act, the Court indicated that Congress had assured that traditional principles of State tort law still apply, including any awarding of punitive damages. It is clear that the Ohio provision for the additional award replaced Ohio tort law, *Bailey, supra.*

The decision in *Silkwood, supra,* establishes that an award of money under tort law was not regulatory and was not intended by Congress to be preempted by the Atomic Energy Act.

The additional award in the instant case is not really different than the award of punitive damages in *Silkwood,*

supra. It follows traditional principles of tort law. It is not regulatory in nature.

2. FEDERAL LAW DOES NOT PREEMPT THE STATE FROM AWARDING COMPENSATION FOR A VIOLATION OF A SPECIFIC SAFETY REQUIREMENT.

As just explained, an additional award of compensation pursuant to a violation of a Specific Requirement is not a regulation of the employer involved. However, even if such an additional award of compensation were to be considered a regulation, the federal statutes do not preempt the State from regulating safety matters which do not affect any of the radiation or nuclear hazards involved with this uranium enrichment plant.

a. Criteria For Preemption.

Federal preemption may arise, in three ways. As stated in *Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board* (1984), 467 U.S. 461, 104 S. Ct. 2518, 81 L. Ed.2d 399:

> Federal law may preempt state law in any of three ways. First, in enacting the federal law; Congress may explicitly define the extent to which it intends to pre-empt state law. (Citation omitted.) Second, even in the absence of express preemptive language, Congress may indicate an intent to occupy an entire field of regulation in which case the States must leave all regulatory activity in the area to the Federal Government. (Citations omitted.) Finally, if Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that the state law actually conflicts with federal law. 104 S. Ct. at 2523.

There is no claim made that the first way state law can be preempted, *i.e.*, explicit congressional language, ap-

plies here. Goodyear has not cited any explicit Congressional language prohibiting the State from awarding workers' compensation for Goodyear's violation of a specific safety requirement.

Nor is there any claim that preemption applies because the state law conflicts with federal law. There is, for instance, no federal requirement that scaffolds at federally owned facilities should have protruding parts. There is no suggestion that Goodyear's compliance with Ohio's safety requirements and workers' compensation laws renders it impossible for Goodyear to comply with federal law or its contract. To the contrary, Goodyear's contract actually requires it to "abide by all applicable laws, regulations, and ordinances" of the State.

Thus, the issue is whether or not Congress, despite the absence of any express preemptive language, nonetheless intended to occupy the entire area and preclude all state regulation.

Before addressing this issue, it may be helpful to set forth several principles of preemption.

First, preemption is generally disfavored. Federal regulation "should not be deemed preemptive of state regulatory power in the absence of persuasive reasons." *Hayfield Northern Railroad Company, Inc. v. Chicago and North Western Transportation Company* (1984), 467 U.S. 622, 104 S. Ct. 2610, 2617, 81 L. Ed.2d 527.

Second, courts are reluctant to infer Congressional intent to preempt if the state law that is being challenged is a general law as opposed to a law dealing specifically with the area in question. *New York Telephone Company v.*

New York State Department of Labor (1979), 440 U.S. 519, 533.

Third, courts are even more reluctant to find preemption when the state regulation involves a matter of traditional state concern, particularly in the areas of health and safety. *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230. Further, as stated in *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.* (1985), 471 U.S. 707, 105 S. Ct. 2371, 85 L. Ed.2d 714, there is a "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." 105 S. Ct. at 2376.

2. There Is No Congressional Intent To Preclude State Regulation Here.

Goodyear argues that the State is preempted from regulating all health and safety by the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.* A review of that entire Act in no way supports this interpretation.

Under 42 U.S.C. § 2061, the Atomic Energy Commission (AEC)[2] was "authorized and directed to produce or to provide for the production of special nuclear material in its own production facilities." The AEC was authorized to enter into contracts with private parties to produce nuclear material at AEC facilities. These independent contractors are required "to comply with all safety and security regulations which may be prescribed by the Commission." 42 U.S.C. § 2061(b).

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[2] The AEC's functions have now been assumed by the Department of Energy.

Section 2061 contains no suggestion that an independent contractor's responsibility to comply with AEC regulations relieves it of its obligation to abide by state workers' compensation laws and safety regulations. Indeed, another section of the Act demonstrates just the opposite—states retain their right to regulate safety matters.

That other section is 42 U.S.C. § 2021. The purpose of that Section is to assure that the federal government cooperates with the states in the regulation of nuclear facilities.

Section 2021 first allows for agreements between the AEC and the states so that the states can assume regulatory control over certain nuclear aspects. 42 U.S.C. § 2021 (b).

Section 2021 then limits the scope of such agreements by stating, in subsection (c), that the AEC has to retain the authority to regulate nuclear production facilities.[3] Congress, however, also made it clear that the retention by the AEC of the authority to regulate production facilities granted in subsection (c) did *not* preclude state regulation of the non-nuclear aspects of such facilities. In clear, unmistakable language, Congress stated, in subsection (k):

---

[3] As defined by 42 U.S.C. §2014(v), "The term 'production facility' means (1) any equipment or device determined by rule of the Commission to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission."

> Nothing in this Section shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards.
>
> 42 U.S.C. § 2021(k).

Subsection (k) is the best indication of Congressional intent that the authority of the AEC to regulate production facilities does not impinge upon the states' authority to regulate non-nuclear hazards. Obviously, the Department of Energy recognized this when it required, as part of its contract, that Goodyear comply with all state laws and regulations.

This intent has also been recognized by the Supreme Court. In *Silkwood v. Kerr-McGee Corporation, supra,* the United States Supreme Court reestablished its prior holding that State regulation is preempted *only* if it falls within the forbidden field of regulating nuclear or radiological hazards. The Supreme Court had previously held in *Pacific Gas & Electric Company v. State Energy Resource Conservation and Development Commission* (1983), 461 U.S. 190, that the Atomic Energy Act preempts the State from regulating *radiological* safety aspects and other *nuclear* hazards involved in the construction and operation of nuclear plants or enrichment facilities.

The Supreme Court in *Pacific Gas* was reviewing a California statute which conditioned the construction of nuclear power plants on the findings of a State Energy Resources Conservation and Development Commission that adequate storage facilities and means of disposal are available.

The utilities had challenged the statute, indicating that it regulated an area which the federal statute had pre-

empted. The Court of Appeals for the Ninth Circuit, at 659 F.2d 918, in the *Pacific Gas & Electric* case, had held that the Atomic Energy Act constituted a Congressional authorization for states to regulate nuclear power plants for purposes other than protection against radiation hazards. *See* 42 U.S.C. § 2018 and 42 U.S.C. § 2021(k).

The Supreme Court affirmed the Court of Appeals' decision, indicating that Congress has preserved a *dual* regulation of nuclear power. The Court indicated that the federal government maintains complete control of the nuclear safety aspects of energy generation and the states exercise the traditional authority of the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking etc. The Supreme Court in the *Pacific Gas* case concluded:

> Therefore, we accept California's avowed economic purpose as the rationale for enacting section 25524.2. Accordingly, the statute lies outside the occupied field of nuclear safety regulation.
>
> 461 U.S. at 216.

An overall review of the Act and these U.S. Supreme Court cases can lead to but one conclusion, and that is that the preemption imposed by the Atomic Energy Act is limited to regulations of radiological and nuclear hazards.

There is nothing in the Atomic Energy Act or otherwise which preempts a state from regulating safety matters involved in the everyday operation of a nuclear facility so long as the regulation does not conflict with federal law or otherwise regulate radiological and nuclear hazards. This conclusion—the states may regulate nonradiological hazards—has been reached by many other courts. A review of those cases can be found in *Annotation: State Regulation of Nuclear Power Plants*, 82 ALR 3d 751.

The specific safety requirement at issue here does not relate to radiological hazards. It is a general requirement, applicable to every employer in this State, not just Goodyear. It is an important part of Ohio's workers' compensation system. And, of course, workers' compensation is traditionally a matter of state, not federal, concern.[4]

As noted above, there is a presumption that traditional areas of state regulation are not preempted. That presumption has not been overcome in this case. Congress did not intend that a private employer would be free to ignore state requirements. State law has not been preempted.

Even if, *arguendo*, there were some overlap between the Federal and State provisions, this Court has stated that the proper judicial approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973). However, Appellant has demonstrated no overlap or conflict with the federal regulatory framework. Further, Appellant has not suggested how the additional award of compensation would obstruct or interfere with the federal regulatory plan.

Appellant here has not even attempted to demonstrate how the award of additional compensation to the

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[4] The federal government's "hands-off" approach to workers' compensation is demonstrated by 28 U.S.C. § 1445(c), which provides that a "civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."

injured worker (a tort-like remedy subsumed by the Workers' Compensation Laws) would obstruct or interfere with the federal regulatory plan.

———o———

CONCLUSION

Goodyear Atomic Corporation is asking this Court to let it pick and choose which parts of the Workers' Compensation Laws it may follow. Goodyear willingly paid workers' compensation premiums for injured employees and readily accepted immunity from tort suit, but now insists that it should not have to pay the additional workers' compensation that is owed due to its violation of a specific safety requirement.

Goodyear's preemption argument is particularly difficult to understand in view of its contract with the Department of Energy. *That contract expressly requires Goodyear to abide by all State laws and regulations.* How can Goodyear argue that state law is preempted when the federal government has told Goodyear it must comply with state law?

This is not a case in which the State of Ohio is regulating the federal government. This is not a case in which the State of Ohio is seeking to regulate nuclear hazards.

Rather, the State is merely telling a private employer, admittedly subject to our workers' compensation laws, that it must pay compensation to an employee injured by its violation of a specific safety requirement, just like every other employer in this State would have to do.

Goodyear would have the Court encroach on an area of law traditionally left to the State. It raised no substantial federal question. Therefore, the Motion to Dismiss should be sustained or the judgment below affirmed.

Respectfully submitted,

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March 11, 1987

APPENDIX 1

Ohio Constitution, Article II, § 35

§ 35 Workmen's compensation.

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damagez at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all right of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the em-

ployer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution. (As amended November 6, 1923. To take effect January 1, 1924.)

Ohio Constitution, Article II, § 28

§ 28 Retroactive laws.

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

INDUSTRIAL FABRICATORS, INC.,

Plaintiff,

vs. C-2-77-119

THE INDUSTRIAL COMMISSION OF OHIO

Defendant.

OPINION AND ORDER

This matter is before the Court on the parties' cross motions for summary judgment.

Plaintiff's employee suffered personal injury when his hand was caught in a power press during the course of his employment. He filed for and received benefits under Ohio's Workmen's Compensation Laws. Thereafter, the employee made a further application for an additional award, claiming that his injury resulted from the plaintiff's failure to comply with a specific safety requirement adopted by the Industrial Commission.[1] He was

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[1]Article II, Section 35 of the Ohio Constitution, which established Ohio's workmen's compensation scheme, provides in pertinent part:

> [The Workmen's Compensation Board] shall have full power and authority to hear and determine whether or not to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection

(Continued on following page)

again successful, obtaining a twenty percent additional award.

Plaintiff now seeks injunctive relief from an additional award, arguing that the Commission Rule upon which the award was based has been preempted by the promulgation of a national consensus standard by the Secretary of Labor pursuant to the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. [The Act].

Pursuant to his authority under the Act, the Secretary of Labor has promulgated safety standards governing the guarding of power presses. 29 C.F.R. § 1910.217-(a)-(g). The Act sets forth those circumstances under which a state may nevertheless regulate the field of occupational safety despite the Secretary's action. Section 667(b) provides:

> Any State which . . desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational or health issues with respect to which a federal standard has been promulgated . . . shall submit [for approval by the Secretary of Labor] a

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(Continued from previous page)

> of the lives, health or safety of employees, enacted by the General Assembly or in the form of an order adopted by such board . . . . When it is found, upon hearing, that an injury, disease, or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen percentum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards . . . .

This provision became effective on January 1, 1924.

> state plan for the development of such standards and their enforcement.[2]

It is undisputed that Ohio has submitted no plan incorporating the rules of the Industrial Commission for approval by the Secretary of Labor. It is accordingly clear in the mind of this Court that, relying solely upon the provisions of § 667(b), the rule of the Commission upon which the additional award was based would ordinarily be preempted and invalid. *See Campbell v. Bussey*, 368 U.S. 297 (1961); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1946).

The defendant Industrial Commission contends, however, that even if the rule would ordinarily be preempted under the Act, its validity is nevertheless preserved by virtue of the provisions of §§ 653(b)(4):

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment.

The additional compensation award granted to plaintiff's employee finds its authority in the Ohio Constitution, Ar-

---

[2]Section 667(a) makes clear that, where the Secretary has promulgated no safety standard, a state may assert jurisdiction over that particular safety or health issue without prior approval by the Secretary of Labor.

ticle II, Section 35.[1] On its face, then, it would appear that the savings clause of 29 U.S.C. § 653(b)(4) expressly preserves the additional award made to plaintiff's employee —as well as the Commission rule upon which it was based.

Plaintiff, however, argues that, because the additional award is in the nature of a penalty, it cannot be characterized as a true workmen's compensation law. It is the plaintiff's contention that by basing the award upon a safety standard promulgated by the Industrial Commission, the Commission is attempting to regulate the field of industrial safety in a manner inconsistent with federal law.

It is immaterial whether or not the State of Ohio chooses to include the award in its workmen's compensation scheme; the award remains an invalid attempt to regulate indirectly an area where direct regulation has been reserved to the federal government. This Court disagrees.

The Act nowhere specifically defines what is meant by "workmen's compensation law" as used in 29 U.S.C. § 653(b)(4). The legislative history provides perhaps some insight into Congress' intent in its reference to "State workmen's compensation programs, upon which injured or diseased workers, and their families are frequently wholly dependent for the replacement of lost income, proper medi-

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[1]While various other aspects of this constitutional provision have been incorporated into Ohio's statutory code, the additional award provision today finds its sole basis in the state constitution and has not been incorporated into the Ohio Revised Code.

Ohio is not the only state with such a workmen's compensation scheme. *See, e.g.*, Hoffman v. Department of Industrial Relations, 287 P. 974 (Cal.); 81 Am. Jur. 2d. "Workmen's Compensation" §§ 55, 359.

cal treatment, and rehabilitation." 1970 U. S. Code Congr. and Admin. News 5177, 5200. *See also* 81 Am. Jur. 2d "Workmen's Compensation" §2.

The history of Ohio's additional award provision indicates that it was meant to fully serve the purpose of compensation and also to supplant the employee's common law rights, pursuant to which he was entitled to seek punitive damages for gross or wilful wrongdoing on the part of his employer. *State ex rel. Engle v. Industrial Commission*, 142 Ohio St. 425 (1944). These two purposes are, of course, the hallmarks of every workmen's compensation scheme.

Unlike true penalties that form a part of the federal regulatory scheme, the additional award authorized under Ohio law goes directly to the injured employee, rather than to a governmental entity. In this respect, then, the award is truly compensatory. *See State ex rel. Bailey v. Krise*, 18 Ohio St.2d 191, 198 (1969). While calculating a portion of the compensation with reference to some standard of culpability on the part of the employer also serves a deterrence factor, this purpose alone undercuts neither the compensatory nature of the award nor the basic purpose of Ohio's Workmen's compensation law.

Accordingly, this Court concludes that Ohio's additional award provision forms an integral part of this state's workmen's compensation law and is therefore preserved by virtue of § 663(b)(4) of the Occupational Safety and Health Act. The fact that the Commission rule may or may not conflict with the Act and the regulations promulgated thereunder does not require a different conclusion, for § 653(b)(4) clearly contemplates such conflict and,

moreover, reflects a Congressional determination that the workmen's compensation scheme would prevail.[4]

In sum, while Ohio's Industrial Commission may be better advised to follow existing OSHA Standards, the plain language of § 653(b)(4) requires the conclusion that the award based upon the Commission rule is not invalid.

WHEREUPON, the Court determines that plaintiff's motion for summary judgment is without merit and it is therefore DENIED. The Court further determines that the defendant's motion for summary judgment is meritorious and it is therefore GRANTED.

The Clerk shall enter final judgment in favor of the defendant.

/s/ Joseph P. Kinneary
United States District Judge

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[4]It is interesting to note, by way of comparison, that an injured employee's common law right of recovery against his employer was typically based upon a finding of fault, a finding that must necessarily have involved measurement of the employer's conduct with reference to some standard, whether articulated or not. Obviously, not every finding of fault would coincide with relevant OSMA standards, yet such causes of action are clearly preserved by § 653(b)(4).

SUPPLEMENTAL

BRIEF

Supreme Court, U.S.
FILED
JUN 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1172

In the Supreme Court of the United States

October Term, 1986

GOODYEAR ATOMIC CORPORATION, APPELLANT

v.

STATE EX REL. ESTO MILLER

ON APPEAL FROM THE SUPREME COURT OF OHIO

SUPPLEMENTAL BRIEF OF RESPONDENT TO AMICUS BRIEF

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TABLE OF CONTENTS

	Page
The Ohio Supreme Court Decided A Narrow Question.....	1
The New Ohio Law Does Not Apply	4
CONCLUSION.....	8

TABLE OF AUTHORITIES

	Page
Cases:	
Killbreath v. Rudy (1968), 16 Ohio St.2d 70	7
Miller v. Hixon (1901), 64 Ohio State 39	6
Silkwood v. Kerr-McGee Corporation, U.S. ___, 78 L. Ed.2d 443, 104 S.Ct. 615 (1984)	3
Statutes:	
40 U.S.C. 290	3, 4
Ohio Revised Code Section 1.48	5, 6
Ohio Revised Code Section 4121.47	4, 5, 6
Other Authorities:	
Ohio Supreme Court Rule 1(C)	2
Ohio Administrative Code Section 4121-3-20(K)(5)	5

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The Ohio Supreme Court Decided A Narrow Question

As the Solicitor General correctly observes (Amicus Brief, page 8), the narrow question before the Ohio Supreme Court was:

> whether the workers' compensation award that Goodyear was required to pay in any event could permissibly be increased . . . .

As the Ohio Supreme Court States (J.S., App. 2a):

> The sole issue in this case is whether the Atomic Energy Act of 1954 preempts the Industrial Commission from considering the merits of Appellee's application for an additional award for a specific safety violation.

In so framing the issue, the Ohio Supreme Court has made it clear that only a narrow issue is being decided.

Rather, the Solicitor General suggests the holding of the Ohio Supreme Court Court is broader.

In this respect, the Court's attention is invited to Ohio Supreme Court Rule 1(C) (Appendix A), which states regarding Ohio Supreme Court Opinions:

> In a per curiam opinion of the Supreme Court, the point or points of law decided in the case are contained within the text of each per curiam opinion and are those necessarily arising from the facts of the specific case before the Court for adjudication.
>
> (Underlining italics in original.)

The Decision in this was a per curiam opinion and arises necessarily from the facts. Thus, it is a very narrow decision.

The Solicitor General does not suggest why under Federal law the "surcharge" is preempted.

The Solicitor General does not distinguish the holding in Silkwood v. Kerr-McGee Corporation, __ U.S. ___, 78 L. Ed.2d 443, 104 S.Ct. 615 (1984).

The Solicitor General (Amicus Brief, page 9) invites the Court's attention to 40 U.S.C. 290, which provides:

> all lands and premises owned or held by the United States of America . . . and to all projects, buildings, constructions, improvements, and property belonging to the United States of America . . . in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

That statutory section would seem to make it clear that the surcharge is permissible. Especially is this so when there were seven states provided for such surcharges in their workers'

compensation law (Amicus, page 13) at the time of the enactment of 40 U.S.C. 290. One would think that the Congress was aware of such provisions and recognized there was a difference between them and safety regulations.

The New Ohio Law Does Not Apply

Finally, the Solicitor General suggests that the law in Ohio has been changed, and for this reason, the case should be remanded.

The new Ohio legislation (Ohio Revised Code Section 4121.47) became effective August 22, 1986. It had been signed by the Governor ninety (90) days before the effective date and well before the Ohio Supreme Court ruled in the instant case. Goodyear made no argument to the Ohio Supreme Court that the new law applied to the case before it. Indeed, Appellant Goodyear, in its Jurisdictional Statement, makes no direct claim that the new law applies to this case.

Perhaps the Ohio parties in this case understand better than the Solicitor General that the new law does not apply.

Ohio has a statute (Ohio Revised Code Section 1.48, Appendix B) which provides:

> A statute is presumed to be prospective in its operation unless expressly made retroactive.

Ohio Revised Code Section 4121.47 was not made retroactive by the Legislature.

The reference by the Solicitor General (Amicus, 18, footnote 11) refers to the provision requiring a monetary assessment against any employer found to have committed two safety violations in a twenty-four (24) month period. That provision does not apply to the instant cause. Ohio Administrative Code Section 4121-3-20(K)(5) [J.S. App. 51a] specifically provides:

> No penalty shall be assessed . . . unless both of the violations took place on or after August 22, 1986.

Thus, the Ohio Industrial Commission, in adopting its Administrative Rule, understands the law is prospective and by Rule has made that clear.

As to the provision in Revised Code Section 4121.47 for the Commission to issue an Order directing the employer to comply with the safety standard, Appellee states that the Ohio Legislature has not tried to give it retroactive effect (Revised Code Section 1.48, supra.).

In Miller v. Hixon (1901), 64 Ohio State 39, the Ohio Supreme Court said:

> A statute which imposes a new or additional burden, duty, obligation, or liability, as to past transactions, is retroactive, and in conflict with that part of section 28, article two of the constitution, which provides that, 'The general assembly shall have no power to pass retroactive laws.'

Until the new legislation (Ohio Revised Code Section 4121.47), the only obligation upon the employer was to pay the "surcharge."

Now, the Ohio Legislature has made a change which is not a procedural or remedial change.

There was no procedure before. It has legislated authority to require a correction of the violation.

It is not a remedial change. Ohio has said in Kilbreath v. Rudy (1968), 16 Ohio St.2d 70 that

> Laws of a remedial nature providing rules of practice, courses of procedure, or methods of review are applicable to any proceedings conducted after the adoption of such laws.

It should be obvious that the requirement to correct is not a "rule of practice, course of procedure or method of review."

CONCLUSION

Having demonstrated that the issue decided by the Ohio Supreme Court is a narrow issue and that the changes by Ohio Revised Code Section 4121.47 do not apply to an injury in 1980, the recommendation of the Amicus should not be followed.

The Motion of Appellee to Dismiss or Affirm should be sustained.

Respectfully submitted,

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June 12, 1987

APPENDIX A

RULE 1. SUPREME COURT OPINIONS

(A) All opinions of the Supreme Court shall be reported in the Ohio Official Reports.

(B) The syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication.

(C) In a *per curiam* opinion of the Supreme Court, the point or points of law decided in the case are contained within the text of each *per curiam* opinion and are those necessarily arising from the facts of the specific case before the Court for adjudication.

APPENDIX B

§ 1.48 Statute presumed prospective.

A statute is presumed to be prospective in its operation unless expressly made retrospective.

HISTORY: 134 v H 607. Eff 1-3-72.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUN 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1172

In the Supreme Court of the United States

OCTOBER TERM, 1986

GOODYEAR ATOMIC CORPORATION, APPELLANT

v.

STATE EX REL. ESTO MILLER

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Whether the State of Ohio, consistently with the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, and the Atomic Energy Act, 42 U.S.C. 2011 *et seq.*, may subject a private contractor operating a federally-owned nuclear production facility to a supplemental workers' compensation award for violation of a state safety standard.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	8
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Alabama v. *King & Boozer*, 314 U.S. 1 (1941)	14
Bell v. *Maryland*, 378 U.S. 226 (1964)	9, 19, 20
California Public Utilities Comm'n v. *United States*, 355 U.S. 534 (1958)	14-15
Carson v. *Roane-Anderson Co.*, 342 U.S. 232 (1952)	4
County of Suffolk v. *Long Island Lighting Co.*, 728 F.2d 52 (2d Cir. 1984)	9
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975)	9
Dorchy v. *Kansas*, 264 U.S. 286 (1924)	19
Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978)	1-2
EPA v. *State Water Resources Control Board*, 426 U.S. 200 (1976)	10
French v. *Dwiggins*, 9 Ohio St. 3d 32 (1984), 458 N.E.2d 827	19
Hancock v. *Train*, 426 U.S. 167 (1976)	8, 10, 14, 15
International Paper Co. v. *Ouellette*, No. 85-1233 (Jan. 21, 1987)	15
Jersey Central Power & Light Co. v. *Township of Lacey*, 772 F.2d 1103 (3d Cir. 1985), cert. denied, No. 85-959 (Feb. 25, 1986)	9
Leslie Miller, Inc. v. *Arkansas*, 352 U.S. 187 (1956)	15
Mayo v. *United States*, 319 U.S. 441 (1943)	10
McCarty v. *McCarty*, 453 U.S. 210 (1981)	9
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)	9-10
Pacific Gas & Electric Co. v. *State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983)	3, 9, 11

Cases—Continued: Page

Paul v. *United States*, 371 U.S. 245 (1963) 14, 16
Penn Dairies, Inc. v. *Pennsylvania Milk Control Comm'n*, 318 U.S. 261 (1943) 14
Rose v. *Rose*, No. 85-1206 (May 18, 1987) 9
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) 15
Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 7, 9, 10, 16, 17
State ex rel. Kroger Co. v. *Industrial Commission of Ohio*, 62 Ohio St. 2d 4, 402 N.E.2d 528 (1980) 17
United States v. *Georgia Public Service Comm'n*, 371 U.S. 285 (1963) 14
United States v. *New Mexico*, 455 U.S. 720 (1982) .. 15
Webb v. *Webb*, 451 U.S. 493 (1981) 19-20

Constitutions, statutes and regulations:

U.S. Const.:
Art. I, § 8, Cl. 17 13
Art. VI, Cl. 2 (Supremacy Clause) 6, 8, 10, 11

Ohio Const. Art. II, § 35 ..... 6, 13
Atomic Energy Act, 42 U.S.C. 2011 *et seq.*:
42 U.S.C. 2014(e) 2
42 U.S.C. 2014(s) 3
42 U.S.C. 2014(v) 3
42 U.S.C. 2014(z) 2
42 U.S.C. 2014(aa) 2
42 U.S.C. 2014cc 4
42 U.S.C. 2018 3
42 U.S.C. 2021 11
42 U.S.C. 2021(a) 4
42 U.S.C. 2021(b) 4, 11
42 U.S.C. 2021(c)(1) 4, 11
42 U.S.C. 2021(g) 4
42 U.S.C. 2021(k) 11
42 U.S.C. 2061(a) 3, 11
42 U.S.C. 2061(b) 4
42 U.S.C. 2061(b)(2)(C) 4, 11
42 U.S.C. 2071-2078 2
42 U.S.C. 2073-2074 2
42 U.S.C. 2091-2099 2

Constitutions, statutes and regulations—Continued: Page

42 U.S.C. 2093-2094 2
42 U.S.C. 2111-2112 2
42 U.S.C. 2111-2114 2
42 U.S.C. 2131-2134 2
42 U.S.C. 2201 note on Transfer of Functions .. 3
42 U.S.C. 2201(b) 4, 11
42 U.S.C. 2201(i) 3, 11
42 U.S.C. 2201(i)(3) 4
42 U.S.C. 5814 3
42 U.S.C. 5841(f) 3

Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 1
Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919 .. 1, 2
Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.* 17

29 U.S.C. 653(b)(1) 5
29 U.S.C. 653(b)(4) 17
28 U.S.C. 1257(2) 9
40 U.S.C. 290 ..... 12, 13, 14
Pub. L. No. 86-373, 73 Stat. 688 3
Ky. Rev. Stat. Ann. § 342.165 (Michie 1983 repl.) .. 13
Mo. Ann. Stat. § 287.120(4) (Vernon 1965) 13
N.M. Stat. Ann. § 52-1-10 (1978) 13
N.C. Gen. Stat. § 97-12 (Michie 1979 repl.) 13
Ohio Rev. Code Ann.:
§ 4121.13(B) (Page 1985 Supp.) 6
§ 4121.13.1 (Page 1980) 16
§ 4121.14-4121.17 (Page 1980) 16
§ 4121.47 (Page 1986 Leg. Bulletin No. 3) 18
§ 4121.47(B) (Page 1986 Leg. Bulletin No. 3) 18-19

S.C. Code Ann. § 42-9-70 (Law. Co-op. 1985) 13
Wis. Stat. Ann. § 102.57 (West 1973) 13
29 C.F.R. 1910.28 5
Ohio Admin. Code (1986):
§ 4121:1-5-03(D)(2) 6
§ 4121-3-20(I) 18
§ 4121-3-20(K)(3) 18

Miscellaneous: Page

H.R. Rep. 2656, 74th Cong., 2d Sess. (1936) 13-14
2A A. Larson, *The Law of Workmen's Compensation* (1983) 13
80 Cong. Rec. (1936):
pp. 9180-9181 14
p. 9643 14
Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Contractor-Operated Facilities, DOE Order 5483.1A (June 22, 1983) 4-5
S. Rep. 93-980, 93d Cong., 2d Sess. (1974) 3
S. Rep. 2294, 74th Cong., 2d Sess. (1936) 13
Safety Analysis and Review System, DOE Order 5481.1A (Aug. 13, 1981) 4
R. Stern, E. Gressman, & B. Shapiro, *Supreme Court Practice* (6th ed. 1986) 9

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1172

GOODYEAR ATOMIC CORPORATION, APPELLANT

v.

STATE EX REL. ESTO MILLER

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. To encourage private involvement in the development of nuclear energy for peaceful purposes, the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919 (Atomic Energy Act or 1954 Act), ended the absolute government monopoly over nuclear energy that had been established by the Atomic Energy Act of 1946, ch. 724, 60 Stat. 755. See *Duke Power Co.*

v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 63 (1978). The 1954 Act permits private involvement under strict federal control. It requires that a private party obtain a federal license from the Nuclear Regulatory Commission (formerly the Atomic Energy Commission)[1] before it may possess, handle, or use "special nuclear material," "source material," and "byproduct material" (42 U.S.C. 2014(e), (z) and (aa), 2071-2078, 2091-2099, 2111-2114). These are, respectively, the materials used in, processed for use in, or produced by nuclear reactions.[2] The 1954 Act also requires that a private party secure a federal license before it may acquire or use a nuclear reactor or any other device capable of utilizing or producing special nuclear material (42 U.S.C. 2131-2134). Licenses can be obtained for industrial, commercial, research, and therapeutic purposes (42 U.S.C. 2073-2074, 2093-2094, 2111-2112, 2131-2134).

Licensees under this system supplement, and in no way displace, the federal government as an operator of nuclear facilities. In particular, a continuing federal operational role is mandated for "nuclear production facilities"—facilities that are capable of producing special nuclear material, the essential fuel for

[1] For the sake of simplicity, we will refer to the Atomic Energy Commission and the Nuclear Regulatory Commission as the Commission.

[2] "Special nuclear material" is material capable of sustaining a chain reaction, including plutonium and enriched uranium 233 and 235 (42 U.S.C. 2014(aa)). "Source material" is material from which the special nuclear materials are derived, including uranium, thorium, and their ores (42 U.S.C. 2014(z)). "Byproduct material" includes radioactive material "yielded in or made radioactive by * * * utilizing special nuclear material" (42 U.S.C. 2014(e)).

reactors, in a manner that may affect the public health or safety or in quantities significant to the national defense and security (42 U.S.C. 2014(v)). The 1954 Act requires that the United States be the exclusive owner of all such production facilities, except those which are licensed by the Commission (of which, in fact, there are none like the Portsmouth plant) or those which are engaged in research and are incapable of producing enough fuel to make an atomic weapon (42 U.S.C. 2061(a)).[3]

Although the 1954 Act expressly preserved state regulatory authority over the generation, transmission, and sale of electric power (42 U.S.C. 2018), Congress in 1954 recognized no other role for the states with respect to regulation of nuclear energy. See *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 207 (1983). In 1959, Congress carefully expanded states' regulatory roles (Pub. L. No. 86-373, 73 Stat. 688), providing that, upon a state's adoption of adequate safety standards, the Commission may enter into a cooperative agreement transferring to the state the power to regulate source material, byproduct material, and quantities of special nuclear material not sufficient to form a critical mass

[3] The responsibility for regulating licensees and for operating government facilities was originally unified in the Atomic Energy Commission. Jurisdiction is now divided, with the Department of Energy (DOE) responsible for the principal operational activities of the federal government and not subject to licensing requirements (42 U.S.C. 2014(s)), and the Nuclear Regulatory Commission responsible for licensing and the regulation of licensees (42 U.S.C. 2201(i), 2201 note on Transfer of Functions, 5814, 5841(f); see S. Rep. 93-980, 93d Cong., 2d Sess. 82-85 (1974)).

(*i.e.*, to sustain a chain reaction). See 42 U.S.C. 2021(a), (b), and (g). The 1959 amendments, however, expressly require the Commission to retain responsibility for regulating both the construction and operation of "utilization facilities" (facilities that use special nuclear material, including power plants (42 U.S.C. 2014cc)) and any privately-owned production facilities (42 U.S.C. 2021(c)(1)). Of course, the 1959 amendments make no provision for state regulation of federally-owned facilities, such as the non-licensed, non-research production facilities now under the jurisdiction of the Department of Energy.

To take advantage of the skill and expertise of private industry, the Department of Energy is authorized to contract with private parties to operate the federally-owned production facilities (42 U.S.C. 2061(b); see *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, 235 (1952)). The Department of Energy must maintain complete control over such facilities, and all contractors are subject to its direction and supervision (42 U.S.C. 2061(b)). The Department has specific authority to set safety standards for the use and handling of radiological material at such facilities (42 U.S.C. 2201(b)), to require contractor compliance with safety and security regulations (42 U.S.C. 2061(b)(2)(C)), and most broadly, to regulate the operation of its facilities "in order to protect health and to minimize danger to life or property" (42 U.S.C. 2201(i)(3)). Pursuant to this authority, the Department has issued a series of orders that set forth a comprehensive occupational safety and health program for federally-owned production facilities. See *Safety Analysis and Review System*, DOE Order 5481.1A (Aug. 13, 1981); *Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Contractor-Operated Facilities*, DOE Order 5483.1A (June 22, 1983).[4]

2. This case involves a federally-owned nuclear production facility in Piketon, Ohio—the Portsmouth Gaseous Diffusion plant (J.S. App. 75a). The facility produces "special nuclear material" (enriched uranium) for civilian and military uses. Aside from a federal facility in Paducah, Kentucky, the Portsmouth plant is the only operating uranium enrichment facility in the Nation; and it is the only facility in the Nation that produces fuel that meets the needs of the Navy's nuclear ships and submarines (J.S. App. 31a). The facility uses classified technologies, and a security clearance is required for full access to the plant. At the times relevant to this case, the facility was operated, under contract with the Department of Energy, by appellant Goodyear Atomic Corporation (J.S. App. 1a). Goodyear was contractually obliged to comply with DOE safety standards, including a detailed standard for scaffold safety. See 29 C.F.R. 1910.28, incorporated by reference in DOE Order 5483.1A, at I-1.

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[4] The Department's non-radiological health and safety standards largely adopt and incorporate by reference standards developed by the Occupational Safety and Health Administration (OSHA). See DOE Order 5483.1A, at I-1. OSHA standards do not apply of their own force, since the OSHA statute excludes coverage of "employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health" (29 U.S.C. 653(b)(1)). The Secretary of Labor has recognized that this exception applies to government-owned, contractor-operated facilities now under the jurisdiction of the Department of Energy (J.S. App. 53a-80a).

On July 30, 1980, Esto Miller, a maintenance mechanic employed by Goodyear at the Portsmouth plant, fell off a government-owned scaffold when his glove caught on a protruding bolt. He injured his ankle and heel. He applied to the Industrial Commission of Ohio for workers' compensation, for which Goodyear pays premiums to cover its Portsmouth employees. The claim was approved, and Miller received $9,000 in benefits (J.S. App. 10a).

Miller then filed an application to the Industrial Commission for a supplemental award of 15% to 50% of the benefits already received. Ohio law provides for such a surcharge (the state insurance fund recoups the money through an increase in the premium paid by the employer) where the injury is caused by the employer's failure to comply with any specific health or safety requirement imposed by the state legislature or a state administrative agency. See Ohio Const. Art. II, § 35; Ohio Rev. Code Ann. § 4121.13(B) (Page 1985 Supp.). Miller alleged that Goodyear had violated Ohio Administrative Code 4121:1-5-03(D)(2), which provides, among other things, that "[e]xposed surfaces [on scaffolds] shall be free from sharp edges, burrs or other projecting parts."

3. The Department of Energy filed a brief amicus curiae opposing Miller's application to the Industrial Commission. The Department contended that the workers' compensation surcharge provision could not be applied to the Portsmouth plant consistently with the Atomic Energy Act and the Supremacy Clause, U.S. Const. Art. VI, Cl. 2. The Industrial Commission agreed that, "under the doctrine of federal preemption," the state safety requirement could not be

applied to the federal facility (J.S. App. 15a). It therefore denied Miller's application without determining whether Goodyear had in fact violated the state scaffold safety standard.

Miller filed a mandamus action in the Ohio Court of Appeals, seeking to compel the Industrial Commission to entertain his application. Goodyear was joined as a necessary party, but the federal government did not participate.[5] The court ruled that Congress had not preempted the field of safety regulation of non-radiological hazards at nuclear production facilities. It further held that Ohio's "specific safety regulations" that apply to employers generally "are equally applicable to an entity that contracts with the federal government for operation of a nuclear power facility owned exclusively by the federal government" (J.S. App. 14a). The court therefore issued the writ of mandamus to the Industrial Commission.

A divided Ohio Supreme Court affirmed (J.S. App. 1a-8a). Relying on *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), the majority broadly ruled that state safety regulations concerning non-radiological hazards were not preempted by the Atomic Energy Act (J.S. App. 1a-4a). The majority did not address Goodyear's separate argument (Br. 7-9) that, regardless of whether the Atomic Energy Act

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[5] The federal government has initiated a related action in the United States District Court for the Southern District of Ohio, *United States* v. *Industrial Commission of Ohio*, No. C2-85-1852. That action seeks an injunction against application of Ohio safety standards to DOE nuclear facilities. Cross-motions for summary judgment are pending, and the district court is holding the case in abeyance pending final disposition of the instant case.

preempted state non-radiological regulation of private licensees, the Supremacy Clause exempted federally-owned facilities from state regulation because such regulation has not been authorized by Congress. Justice Wright, in dissent, agreed with Goodyear's Supremacy Clause argument. Relying on *Hancock* v. *Train*, 426 U.S. 167, 179 (1976), he concluded that congressional authorization would be required for application of state regulation to the federal facility and that no such authorization was present here (J.S. App. 4a-8a).

DISCUSSION

The broad ruling of the Ohio Supreme Court—that all state regulation of non-radiological hazards at federal as well as private facilities is lawful—is clearly incorrect under the Supremacy Clause. The narrow question before the Ohio court, however, was not whether a state may in general regulate safety at nuclear facilities, or even at federal nuclear facilities, but whether the workers' compensation award that Goodyear was required to pay in any event could permissibly be increased by several thousand dollars. The judgment of the Ohio Supreme Court could thus be defended on the alternative and narrower ground that the surcharge sought to be imposed on Goodyear is not a "regulation" of the federal plant, and hence that the Supremacy Clause is not implicated at all. A holding to that effect, though potentially damaging to federal interests, and entailing difficult legal questions, would not be as obviously incorrect as the court's broad pronouncement.

In our view, there is no need for this Court to confront those difficult legal issues now. The question whether Ohio's workers' compensation scheme effects

an impermissible "regulation" of federal nuclear facilities has been substantially altered by an intervening change in Ohio law. We therefore recommend that the decision of the Ohio Supreme Court be vacated and the case remanded so that that court may consider the effect on its ruling of the intervening development. *Bell* v. *Maryland*, 378 U.S. 226, 238-241 (1964).[6]

1. The Ohio Supreme Court broadly ruled that states are free to regulate non-radiological safety hazards at nuclear facilities. Whatever the correctness of that ruling with respect to private facilities,[7] as to which the decision below is pure dictum, the ruling is clearly incorrect as applied to a federally-owned facility. Beginning as early as *M'Culloch* v.

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[6] The case is properly before this Court on appeal under 28 U.S.C. 1257(2). The Ohio Supreme Court upheld the application of the state workers' compensation surcharge provision against the contention that such application was unconstitutional under the Supremacy Clause. See *Rose* v. *Rose*, No. 85-1206 (May 18, 1987), slip op. 4 n.3; *McCarty* v. *McCarty*, 453 U.S. 210, 219 n.12 (1981); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 112-113 (6th ed. 1986). We also think the judgment below is final, even though further proceedings before the Ohio Industrial Commission are contemplated, because the case falls within either the first or fourth category set forth in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 479, 482-483 (1975). As far as we can tell, the federal issue has been finally decided by the Ohio Supreme Court, there is no real doubt about the result that would be reached by the Industrial Commission, reversal by this Court would preclude further proceedings, and a serious erosion of federal policies is alleged.

[7] See *Silkwood*, 464 U.S. at 250-251; *Pacific Gas & Electric Co.*; *Jersey Central Power & Light Co.* v. *Township of Lacey*, 772 F.2d 1103, 1111 (3d Cir. 1985), cert. denied, No. 85-959 (Feb. 25, 1986); *County of Suffolk* v. *Long Island Lighting Co.*, 728 F.2d 52, 58 (2d Cir. 1984).

Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819), this Court has held that the activities and installations of the United States are exempt under the Supremacy Clause from direct state regulation, unless such regulation has been clearly and unambiguously authorized by Congress. *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 211 (1976); *Hancock* v. *Train*, 426 U.S. at 178-179; *Mayo* v. *United States*, 319 U.S. 441 (1943). "[W]here 'Congress does not affirmatively declare its instrumentalities or property subject to regulation,' the federal function must be left free' of regulation." *Hancock* v. *Train*, 426 U.S. at 179 (quoting *Mayo* v. *United States*, 319 U.S. at 447, 448 (footnote omitted)). The exemption applies even though the federal facility is managed by a private party under contract with the United States. Indeed, *Hancock* v. *Train* involved the Paducah, Kentucky, nuclear production facility, which is owned by the federal government and operated by a private contractor in the same manner as the Portsmouth plant at issue here. See 426 U.S. at 174 n.23.

As Justice Wright pointed out in dissent (J.S. App. 6a-7a), there is no authorization for states to regulate federally-owned nuclear production facilities like the Portsmouth plant. The majority of the Ohio Supreme Court did not rule otherwise, since it erroneously thought that preemption analysis of the sort undertaken in *Silkwood*, which would be required for private facilities, was also called for here. Even appellee does not contend that federal law affirmatively authorizes state regulation of federal nuclear facilities, and no such contention could plausibly be maintained. As we have noted, while the Atomic Energy Act provides for a limited state regulatory role in circumstances not present here—*e.g.*, where the Commission enters into a cooperation agreement permitting a state to regulate "special nuclear materials in quantities not sufficient to form a critical mass" (42 U.S.C. 2021(b))—the Act does not provide for state regulation of federal production facilities like the Portsmouth plant. To the contrary, the Act requires the federal government to retain authority for regulating the operation of all production facilities (42 U.S.C. 2021(c)(1)) and to retain ownership and control of non-licensed, non-research production facilities (42 U.S.C. 2061(a)). The Act also specifically empowers the Department of Energy to set safety standards at federally-owned facilities (42 U.S.C. 2201(b) and (i); see also 42 U.S.C. 2061(b)(2)(C)). In short, contrary to the Ohio Supreme Court's ruling, direct state regulation of federal nuclear production facilities is clearly lacking congressional authorization and hence is invalid under the Supremacy Clause.[8]

2. Despite the breadth of the Ohio Supreme Court's reasoning, this case, as it arose and as it was presented to that court, did not involve direct state

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[8] Contrary to the statement of the Ohio Court of Appeals (J.S. App. 13a), 42 U.S.C. 2021(k) does not support the notion that Congress has authorized state regulation of safety at federal production facilities. Section 2021 is the statute that authorizes the Commission to sign cooperation agreements permitting states to regulate certain *licensed* nuclear facilities. See pages 3-4, *supra*. Section 2021(k) says that "[n]othing in this [S]ection shall be construed to affect the authority of any State or local government to regulate activities for purposes other than protection against radiation hazards." As this Court has pointed out, Section 2021(k) "does not represent an affirmative grant of power to the states." *Pacific Gas & Electric Co.*, 461 U.S. at 210.

regulation of the "instrumentalities or property" of the federal government. Rather, the case involved the imposition of a monetary workers' compensation surcharge on Goodyear, a private party, for activities conducted under contract with the federal government. The judgment appealed from can thus be defended on the theory that the imposition of this surcharge would not be an impermissible "regulation" of the Portsmouth plant; indeed, it is on that alternative ground that appellee principally relies. See Mot. to Aff. 5-9. Confined to those facts, the holding of the Ohio Supreme Court is actually quite narrow and, as far as we can tell at this time, not of widespread significance. And while the holding, thus confined, is troublesome both legally and practically for reasons not even adverted to by the Ohio Supreme Court, it is not as clearly incorrect as the court's broad pronouncement.

a. Proper analysis of the narrow question actually presented here must begin with 40 U.S.C. 290, a federal statute that the Ohio Supreme Court ignored. That section expressly grants states the authority to apply their "workmen's compensation laws" to

> all lands and premises owned or held by the United States of America * * * and to all projects, buildings, constructions, improvements, and property belonging to the United States of America * * * in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

The language and legislative history of this provision make clear that it is addressed to federal enclaves,

areas over which the United States has assumed exclusive jurisdiction under U.S. Const. Art. I, § 8, Cl. 17. See S. Rep. 2294, 74th Cong., 2d Sess. (1936); H.R. Rep. 2656, 74th Cong., 2d Sess. (1936). But the provision *a fortiori* authorizes the application of state workers' compensation laws to federal facilities, like the Portsmouth plant, that are not federal enclaves.

The authorization embodied in Section 290, however, does not necessarily extend to a workers' compensation *surcharge* of the sort involved here. Although a few states, including Ohio, had such provisions in 1936, when 40 U.S.C. 290 was enacted,[9] the legislative history of the statute contains no mention of those obviously atypical provisions. The legislative history also shows that Congress did not intend safety laws to apply to federal projects. The House version of the bill that became 40 U.S.C. 290 expressly provided for application to federal projects, not only of workers' compensation laws, but also of state "safety" and "insurance" laws (H.R. Rep. 2656, *supra*). But the Senate amended the bill "by striking out all provisions subjecting Federal property to State safety and insurance regulations" (S. Rep.

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[9] By the end of 1936, seven states apparently had statutes providing for workers' compensation surcharges based on violations of safety regulations or failure to provide required safety devices. See 2A A. Larson, *The Law of Workmen's Compensation* § 69.10, at 13-107 to 13-111 (1983). For the current versions of these statutes, see Ky. Rev. Stat. Ann. § 342.165 (Michie 1983 repl.); Mo. Ann. Stat. § 287.120(4) (Vernon 1965); N.M. Stat. Ann. § 52-1-10 (1978); N.C. Gen. Stat. § 97-12 (Michie 1979 repl.); Ohio Const. Art. II, § 35; S.C. Code Ann. § 42-9-70 (Law. Co-op. 1985); Wis. Stat. Ann. § 102.57 (West 1973).

2294, *supra*, at 2), and the Senate version became the law (80 Cong. Rec. 9180-9181, 9643 (1936)). Accordingly, it is far from clear that 40 U.S.C. 290 authorizes a workers' compensation surcharge provision that indirectly enforces state safety regulations at federal facilities.

b. Since 40 U.S.C. 290 does not by itself answer the narrow question presented here, it is necessary to locate the oft-debated and not-always-bright line between presumptively invalid state regulation of the federal government and presumptively valid state regulation of private parties who deal with the federal government. Although direct state regulation of federal facilities must be congressionally authorized, private parties are not immunized from generally applicable state laws simply because they happen to deal with the United States. As this Court has observed (*Hancock* v. *Train*, 426 U.S. at 179-180), congressional authorization is not required for all state regulations that "may touch the activities of the Federal Government." See, *e.g.*, *Penn Dairies, Inc.* v. *Pennsylvania Milk Control Comm'n*, 318 U.S. 261 (1943); *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941). Thus, where a state regulation applies, not to the federal government or to federal property, but to private parties in their dealings with the United States, this Court's decisions, though they do not state a clear rule, generally have undertaken an inquiry into whether the regulation in any way frustrates or impairs federal interests or programs, if only by imposing burdens that hamper progress toward federal goals. *E.g.*, *United States* v. *Georgia Public Service Comm'n*, 371 U.S. 285 (1963); *Paul* v. *United States*, 371 U.S. 245 (1963); *California Public Utilities Comm'n* v. *United States*, 355 U.S.

534 (1958); *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956). Cf. *United States* v. *New Mexico*, 455 U.S. 720 (1982) (a nondiscriminatory state tax, absent congressional displacement, is unlawful under the Supremacy Clause only if it is imposed directly on the federal government or its alter ego).

Under these principles, Ohio's surcharge provision is in our view quite vulnerable. By exacting a penalty for the violation of safety standards, that provision effectively regulates Goodyear's operation of the Portsmouth plant and its use of federal property for federal purposes. As this Court has pointed out (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)), "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." See also *International Paper Co.* v. *Ouelette*, No. 85-1233 (Jan. 21, 1987), slip op. 16 n.19.[10] There is accordingly some reason to treat the Ohio provision, though it is an indirect rather than a direct regulation of the use of federal property and the performance of a federal function, as one requiring congressional authorization, concededly absent here. See *Hancock* v. *Train*, *supra*.

Even if the principle of *Hancock* v. *Train* does not apply, however, strong arguments can be made that the Ohio surcharge provision would frustrate federal objectives, and hence be invalid under the somewhat

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[10] The Ohio courts' characterization of the workers' compensation surcharge as compensatory rather than penal (see Mot. to Aff. 5-7) does not alter the regulatory effect of the law and does not control the constitutional analysis.

less demanding standard of *Paul* v. *United States*, *supra*, and the related cases. The surcharge provision could well impair the operation of the Portsmouth facility, which uses classified technology and is essential to the national security, by effectively requiring Goodyear to comply with standards over and above those deemed appropriate by the Department of Energy under its statutory authority. See pages 4-5, *supra*. Federal interests could also be seriously impaired by the investigations (including on-site inspections, subpoenas of documents, and compulsory attendance of witnesses) authorized by the Ohio workers' compensation statute (Ohio Rev. Code Ann. §§ 4121.13.1, 4121.14-4121.17 (Page 1980)).

On the other hand, we think that at least two arguments could reasonably be made in support of the Ohio provision. First, this Court held in *Silkwood* (464 U.S. at 249-258) that state tort law, including the availability of punitive damages, was not preempted by the Atomic Energy Act. The Court reasoned that Congress, though recognizing an exclusive federal regulatory role over nuclear facilities, intended to preserve state tort law notwithstanding its incidental regulatory effects. Workers' compensation, of course, is traditionally a substitute for state tort law. And while the workers' compensation surcharge involved here is more obviously "regulatory" than the general tort system at issue in *Silkwood*, since its application is tied exclusively to the violation of a specific state safety standard, the *Silkwood* analysis may conceivably apply by analogy. In other words, to the extent that the Ohio surcharge provision requires a private party to pay money for injuries it caused, *Silkwood* might suggest that the provision does not unconstitutionally frustrate the

federal program, even as applied to a contractor operating a federal (rather than, as in *Silkwood*, a privately-owned) facility, any more than the general tort law interfered with the federal government's exclusive regulatory role in the earlier case.

Second, the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, though not applicable to the Portsmouth facility because the DOE is exercising its own OSHA-type authority (see page 5, *supra*), is arguably of some relevance in assessing whether the Ohio workers' compensation surcharge is compatible with exclusive federal regulatory power. The Act provides (29 U.S.C. 653(b)(4)):

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

If the OSHA statute applied here, this savings proviso on its face could conceivably be construed to encompass and thus to preserve the Ohio surcharge provision. See *State ex rel. Kroger Co.* v. *Industrial Commission of Ohio*, 62 Ohio St. 2d 4, 402 N.E.2d 528 (1980). The OSHA statute does not apply here, however; and even if the OSHA savings clause were construed to cover the Ohio surcharge provision in other contexts, a different result might well be required where, as here, a federal nuclear facility engaged in activities affecting the national security is concerned.

3. In our view, it is unnecessary for this Court to resolve the difficult and novel issues presented by this case as it stood before the Ohio Supreme Court. Since that court rendered its decision (August 20, 1986), Ohio has changed its workers' compensation law in at least one critically important respect. Effective August 22, 1986, the law requires the Ohio Industrial Commission, upon finding a violation of a safety standard in deciding a claim for a surcharge, to issue an order directing the employer to comply with the safety standard. See Ohio Rev. Code Ann. 4121.47 (Page 1986 Leg. Bulletin No. 3, at 272); Ohio Admin. Code § 4121-3-20(I) (1986); J.S. App. 46a-48a.[11] We believe that this new provision, as applied to Goodyear, the employer in this case, would constitute a clearly unlawful (because congressionally unauthorized) direct regulation of the federal nuclear production facility.

It is a question of state law whether this new provision would be applied if the case were to return to the Industrial Commission. And contrary to appellee's suggestion (Mot. to Aff. 2, 3), there is a substantial possibility that it would apply. The language of the statute surely admits that construction, since it states that the Commission, upon adjudicating an employer liable for a surcharge, "shall, in addition to any award paid to the claimant, issue an order to correct the violation within such period of time as the Commission fixes" (Ohio Rev. Code Ann.

[11] The law as amended also requires assessment of a monetary penalty against any employer that is found to have committed two safety violations in a 24-month period. See Ohio Rev. Code Ann. § 4121.47 (Page 1986 Leg. Bulletin No. 3, at 272); Ohio Admin. Code § 4121-3-20(K)(3) (1986); J.S. App. 49a-51a.

§ 4121.47(B) (Page 1986 Leg. Bulletin No. 3, at 272)). The Commission in this case, of course, has not yet adjudicated a safety violation; and the new statute could well be read to govern its conduct when and if it does so. It is by no means clear that such an application of the new Ohio statute would constitute "retroactive" legislation (see Mot. to Aff. 2), and Ohio law permits "retroactive" application of procedural or remedial legislation in any event. See *French* v. *Dwiggins*, 9 Ohio St. 3d 32, 458 N.E.2d 827 (1984). It would also be a question of state law whether the new provision is severable from the surcharge provision that was before the Ohio Supreme Court when it rendered its decision. See, *e.g.*, *Bell* v. *Maryland*, 378 U.S. 226, 238-241 (1964); *Dorchy* v. *Kansas*, 264 U.S. 286, 290-291 (1924). If it is not severable, application of the surcharge provision to Goodyear would in our view be unlawful.

This Court may well have jurisdiction to decide the state-law questions (see *Bell* v. *Maryland*, *supra*; *Dorchy* v. *Kansas*, *supra*), and the questions may not appear difficult to answer. Nevertheless, we think it inappropriate for the Court to resolve those questions here for reasons in addition to the usual inadvisability of this Court's deciding questions of state law. The Ohio Supreme Court issued a broad and unnecessary ruling of potentially great impact, and its analysis of the narrow issue actually presented for decision was altogether inadequate. In these circumstances, vacating the decision below would remove a flawed decision from the books and, if the case is not settled on remand, would give the Ohio Supreme Court an opportunity not only to consider the effect of the intervening change of state law but also to reconsider its previous analysis. Cf. *Webb* v. *Webb*,

451 U.S. 493, 499-500 (1981) (comity supports according state courts a full opportunity to consider objections to state law based on federal law). Accordingly, we think it is appropriate for the Court to follow the course it followed in *Bell* v. *Maryland*, 378 U.S. at 237-241, and other cases there discussed, and to vacate the decision below and remand the case to the Ohio Supreme Court.

CONCLUSION

The judgment of the Ohio Supreme Court should be vacated and the case remanded to that court for further consideration.

Respectfully submitted.

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APPENDIX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GOODYEAR ATOMIC CORPORATION,
Appellant,

v.

STATE EX REL. ESTO MILLER,
Appellee.

On Appeal From The Supreme Court Of Ohio

JOINT APPENDIX

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Jurisdictional Statement filed: **January 17, 1987**
Probable Jurisdiction noted: **June 22, 1987**

TABLE OF CONTENTS

	Page
Relevant Docket Entries of the Ohio Supreme Court	JA-1
Relevant Docket Entries of the Ohio Court of Apppeals	JA-2
Opinion of Ohio Supreme Court	JA-4
Opinion of Ohio Court of Appeals	JA-12
Decision of Industrial Commission of Ohio	JA-18
Decision of Industrial Commission of Ohio	JA-21
Judgment Entry of Ohio Supreme Court	JA-24
Mandate of Ohio Supreme Court	JA-26
Notice of Appeal to the Supreme Court of the United States	JA-28
Notice of Appeal to the Supreme Court of the United States	JA-30
Ohio Admin. Code § 4121:1-5-03(D)(2)	JA-32
Application for Payment of Compensation and Medical Benefits	JA-33
Employer's Report of Industrial Injury	JA-37
Amendment to Form C-8-5M-3-64	JA-40
Letter from Goodyear Atomic Corporation to the Industrial Commission of Ohio	JA-43
Foreman's Report of Accident	JA-45
Accident/Incident Investigation Report	JA-46
Letter from OCAW Safety Representative	JA-48
Stipulation of Fact	JA-50
History of Occupational Health and Safety at DOE Facilities	JA-54
Ohio Admin. Code § 4121-3-20	JA-64
Report to United States Atomic Energy Commission	JA-78

Letter to Secretary of Labor Peter J. Brennan . JA-83
Letter to Chairman of U.S. Atomic Energy Commission Dixy Lee Ray JA-85
Memorandum Listing Government-Owned, Contractor-Operated Facilities JA-88
Ohio Constitution Article II, § 35 ..... JA-106
Ohio Constitution Article II, § 28 ..... JA-107
Opinion and Order, *Industrial Fabricators, Inc. v. Industrial Commission*, No. C-2-77-119 (S.D. Ohio) JA-109
Workmen's Compensation Report of Investigation JA-114

Relevant Docket Entries of the Ohio Supreme Court

9/26/85	Notice of Appeal
11/8/85	Original papers filed
12/5/85	Appeal for Stay of Execution
12/18/85	Appeal for Stay of Execution Denied
12/25/85	Record filed
1/6/86	Appellant Merit Brief filed
2/5/86	Appellees Merit Brief filed
2/25/86	Reply Brief filed
8/20/86	Case affirmed; opinion issued
10/27/86	Notice of Appeal to U.S. Supreme Court

Relevant Docket Entries of the Ohio Court of Appeals

Case No. 84AP208

Court of Appeals Appearance Docket No. 41

STYLE

STATE OF OHIO, Ex Rel.,
ESTO R. MILLER
Route 1, Box 111-JJ
McDermott, Ohio 45642

Relator

VS

INDUSTRIAL COMMISSION OF OHIO
246 North High Street
Columbus, Ohio 43215
and
JAMES MAYFIELD, Administrator
Bureau of Workers' Compensation
246 North High Street
Columbus, Ohio 43215

Respondents et al.

Year	Month	Day	
1984	Feb	23	Complaint in Mandamus, filed.
1984	Mar	20	Answer of Respondent Goodyear Atomic Corp., filed.
1984	Apr	9	Jack R. Kullman, Jr., is hereby appointed Referee in this Cause. Objections to the Referee's report, if any, shall be filed as provided by Civ. R. 53(E)(2). Briefs in support or opposition to be filed by Rule 11 Section 13. Oral Agreement to the Court upon objections will be permitted only if requested in writing within the time for filing objections thereto. As per entry.

1984	June	13	Brief of Respondent Goodyear Atomic Corp., filed.
1984	Dec	17	Referee's Report rendered (16 pages).
1985	Jan	14	Respts, Goodyear Atomic Corp. Objections to Referee's Report.
1985	Jan	14	Respt. Goodyear's Brief in support of Objections to Referee's Report, filed.
1985	July	25	Opinion Rendered 7 pages.
1985	Aug	22	Appellant (Goodyear) Notice to appeal to Oh. S.C.

THE STATE, EX REL. MILLER,

Appellee,

v.

INDUSTRIAL COMMISSION OF OHIO *et al.*;
GOODYEAR TIRE & RUBBER COMPANY,

Appellant.

[Cite as State, ex rel. Miller, v. Indus. Comm. (1986), 26 Ohio St. 3d 110.]

Workers' compensation—Scaffolds—Specific safety requirements not preempted by Atomic Energy Act of 1954 for worker injured in nuclear production facility owned by federal government.

(No. 85-1524—Decided August 20, 1986.)

APPEAL from the Court of Appeals for Franklin County.

Appellee, Esto R. Miller, was a maintenance mechanic employed by the Goodyear Atomic Corporation. On July 30, 1980, appellee was working on a manually propelled scaffold, removing old piping hangers. While appellee was lowering a section of the upper guardrail, his glove caught on a bolt which was protruding from the surface of the scaffold, pulling him off the platform. He fell approximately six and one-half feet to a concrete floor. Appellee suffered an injury to his left ankle, and his claim for workers' compensation benefits was fully certified by his employer. At the time appellee was injured, he was working at the Portsmouth Gaseous Diffusion Plant, a nuclear production facility owned by the United States Government and operated by Goodyear pursuant to a contract with the United States Department of Energy.

In December 1980, appellee filed an amended application for an additional award for a violation of a specific safety

requirement, asserting that his injury was the proximate result of Goodyear's failure to comply with certain safety standards promulgated by the Industrial Commission. The Industrial Commission held a hearing and found that, because of the doctrine of federal preemption, it did not have jurisdiction to apply the code of specific safety requirements to the Goodyear Portsmouth Gaseous Diffusion Plant. Appellee requested a rehearing which was denied.

Appellee then filed a complaint for a writ of mandamus with the Court of Appeals for Franklin County requesting an order directing the Industrial Commission to consider his application for an additional award. The case was assigned to a referee who recommended that the requested writ be issued. Both the Industrial Commission and Goodyear filed objections to the referee's recommendation. The court of appeals adopted the recommendation of the referee and issued the writ.

The cause is now before this court on an appeal as of right.

Jaffy, Livorno, Kaufmann & Arnett Co., L.P.A., Stewart R. Jaffy, John F. Livorno and *Henry A. Arnett*, for appellee.

Vorys, Sater, Seymour & Pease and *Robert E. Tait*, for appellant.

Per Curiam. The sole issue in this case is whether the Atomic Energy Act of 1954 preempts the Industrial Commission from considering the merits of appellee's application for an additional award for a specific safety violation. The doctrine of federal preemption has its roots in the Supremacy Clause of the United States Constitution, in Article VI, which states in pertinent part:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; * * * shall be the Supreme Law of the Land; and the Judges in every

State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

There are generally three tests for federal preemption. Congress may expressly preempt state authority in a given area. *Jones v. Rath Packing Co.* (1977), 430 U.S. 519. Absent express preemption, where state law conflicts with or frustrates federal law or its objectives, federal law may supersede state law. *Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132. Additionally, if a scheme of federal regulations is so pervasive so as to leave no room for the states to supplement it, federal preemption may be found. *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218.

The state authority involved in the instant case is the Industrial Commission and its specific safety requirements. The federal law which allegedly preempts the Industrial Commission from applying its specific safety requirements is the Atomic Energy Act of 1954, Section 2011 *et seq.*, Title 42, U.S. Code. The United States Supreme Court discussed the preemption doctrine in the context of the Atomic Energy Act of 1954 in the recent case of *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238. The *Silkwood* court held at 256-257:

"* * * [I]nsofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standard or whether the imposition of a state standard in a damages action would frustrate the objectives of federal law."

Nowhere in the Atomic Energy Act has Congress expressly preempted state authorities from applying workers' compensation safety requirements to protect workers at nuclear power plants against safety hazards unrelated to radiation. Similarly, the specific safety requirements em-

bodied in Ohio workers' compensation law do not conflict with or frustrate the Atomic Energy Act of 1954 or its objectives.

The question which remains is whether the scheme of federal regulations set forth in the Atomic Energy Act is so pervasive as to leave no room for state supplementation. The intent of Congress in promulgating the Atomic Energy Act was to provide regulation and controls necessary to minimize hazards inherent to the production of nuclear power. As recognized by the *Silkwood* court, that Act does not completely occupy the field of safety at nuclear production facilities. The Atomic Energy Act does not even address the basic safety precautions necessary to protect workers in any manufacturing plant. The instant case involves an injury to a worker because of an allegedly defective scaffold. It could not have been the intent of Congress to allow the state of Ohio to protect every worker who uses a scaffold, except those workers who use scaffolds at atomic energy plants. Since the entire field of safety at nuclear production facilities is not regulated by the Atomic Energy Act, the court of appeals was correct in concluding that the Industrial Commission is not preempted from applying Ohio's specific safety requirements in the case at bar.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C. J., SWEENEY, LOCHER, HOLMES, C. BROWN and DOUGLAS, J.J., concur.

WRIGHT, J., dissents.

WRIGHT, J., dissenting. As the majority expressed, the Supremacy Clause of the United States Constitution operates to preempt state regulation where there is a direct expression of preemptive congressional intent, *Campbell v. Hussey* (1961), 368 U.S. 297; *Pacific Gas & Elec. Co. v.*

State Energy Resources Conserv. & Dev. Comm. (1983), 461 U.S. 190, where congressional intent is implied, *Burbank v. Lockheed Air Terminal* (1973), 411 U.S. 624; *Bhd. of RR. Trainmen v. Jacksonville Terminal Co.* (1969), 394 U.S. 369, or where there is a conflict between federal and state regulations, *Perez v. Campbell* (1971), 402 U.S. 637; *Hines v. Davidowitz* (1941), 312 U.S. 52.

What apparently escapes the majority's scrutiny is that, where the attempted state regulation involves a federal facility, state regulation is permitted "only when and to the extent there is 'a clear congressional mandate,' • • • that makes this authorization of state regulation 'clear and unambiguous.' " *Hancock v. Train* (1976), 426 U.S. 167, 179. *See Kern-Limerick, Inc. v. Scurlock* (1954), 347 U.S. 110; *United States v. United Mine Workers* (1947), 330 U.S. 258; *M'Culloch v. Maryland* (1819), 17 U.S. (4 Wheat.) 316, 426. In *Hancock v. Train, supra*, the United States Supreme Court stated, "this immunity means that where 'Congress does not affirmatively declare its instrumentalities or property subject to regulation,' 'the federal function must be left free' of regulation." *Id.* at 179. No such congressional exception exists with respect to the Portsmouth Gaseous Diffusion plant. It has been held that any state or private activity that attempts to regulate, supervise, or in any way deal with the safety and health aspects of such facilities is *per se* invalid. See *Pacific Gas & Elec. Co., supra; Northern States Power Co. v. Minnesota* (C.A. 8, 1971), 447 F.2d 1143, affirmed (1972), 405 U.S. 1035; *Suffolk v. Long Island Lighting Co.* (C.A. 2, 1984), 728 F.2d 52.

In the instant case, the Atomic Energy Act ("the Act") requires federal government ownership of and exclusive jurisdiction over nuclear production facilities. Section 2061, Title 42, U.S. Code, provides: "(a) the Commission [the Department of Energy ("DOE")] as agent of and on behalf of the United States, shall be the exclusive owner of all production facilities • • •. (b) • • • To the extent deemed

necessary, the Commission [DOE] is authorized to make, or to continue in effect, contracts with persons obligating them to produce special nuclear material and facilities owned by the Commission. • • • Any contract entered into under this section shall contain provisions • • • obligating the contractor • • • to comply with all safety and security regulations which may be prescribed by the Commission [DOE]. • • • " Clearly, all regulation of the Portsmouth plant is within the exclusive province of the United States, and any state intrusion into that area is absolutely prohibited absent a "clear congressional mandate" to the contrary. *Hancock, supra*, at 179.

In granting the writ of mandamus and finding no preemption, the majority confuses the exclusivity granted DOE in the regulation of health and safety at its federally owned, contractor-operated facilities with the more limited authority granted the Nuclear Regulatory Commission ("NRC") over *nonfederally owned* nuclear power plants. Section 2021, Title 42, U.S. Code, authorizes the establishment of regulatory agreements between the NRC (formerly the Atomic Energy Commission ["AEC"]) and the states, Senate Report No. 870, 86th Cong. 1st Session, 1959 U.S. Code Congressional and Administrative News 2872, 2875, 2879. In that context, Section 2021(k) provides, "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." See, also, *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238. Recognizing the inherent limitations of the Act, the United States Supreme Court has held that Section 2021(k) "does not represent an affirmative grant of power to the states," *Pacific Gas & Elec. Co., supra*, at 210, and in no way disturbs the rights and prerogatives granted the federal government under Sections 2061, 2201(e), and 2201(i), Title 42, U.S. Code. Further, Section 2021(c)(1) specifically excepts from its application any nuclear "production or utilization facility," such as the Portsmouth

plant. That section states: "No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of—(1) the construction and operation of any production or utilization facility." Any reliance upon Section 2021 as support for the majority's determination is clearly misplaced.

In *Pacific Gas & Elec. Co., supra*, the United States Supreme Court outlined the parameters of federal preemption under the Act as follows: "State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States. When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.' " *Id.* at 212-213.

The specific safety requirements that Miller seeks to have imposed on the Portsmouth plant fall squarely within an area regulated by the federal government. In the Act, Congress mandated the development of comprehensive federal safety regulations, and through Orders 5481, 5482, and 5483, DOE had promulgated both radiological and non-radiological standards specifically applicable to its federally owned, contractor-operated facilities. In addition, the Goodyear contract itself at Article XX contains an express provision requiring compliance "with all applicable safety and health regulations and requirements * * * of DOE" and prescribing the right to work stoppage if compliance is not effected.

In the Atomic Energy Act, Congress did not express an intention to delegate to the states any of the regulatory authority granted to DOE and, with respect to production

facilities, mandated that sole regulatory control remain with the United States. As a federally owned facility, the Portsmouth plant is under the exclusive control of DOE and the imposition of any state-promulgated regulations on that operation, including Ohio specific safety requirements, is constitutionally and statutorily impermissible. The Industrial Commission was manifestly correct in finding that it lacked jurisdiction to consider Miller's application. The issuance of the writ is clearly improper. The decision of the court of appeals should be reversed.

Accordingly, I respectfully dissent.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

No. 84AP-208
(REGULAR CALENDAR)

STATE OF OHIO, ex rel. ESTO R. MILLER,

Relator,

v.

INDUSTRIAL COMMISSION OF OHIO AND GOODYEAR ATOMIC CORPORATION *et al.*,

Respondents.

OPINION

Rendered on July 25, 1985

STEWART JAFFY, LIVORNO, KAUFMANN & ARNETT CO., L.P.A., MR. STEWART R. JAFFY, MR. JOHN F. LIVORNO, and MR. HENRY A. ARNETT, for relator.

MR. ANTHONY J. CELEBREZZE, JR., Attorney General, MR. LEE M. SMITH, and MR. DOUGLAS M. KENNEDY, for respondents, Industrial Commission of Ohio and James Mayfield, Administrator.

VORYS, SATER, SEYMOUR & PEASE, and MR. ROBERT E. TAIT, for respondent Goodyear Atomic Corporation.

IN MANDAMUS

McCORMAC, J.

This action in mandamus was referred to Jack R. Kullman, Jr., as referee with full powers under Civ. R. 53. He issued his report on December 17, 1984. The case is now before us on objections to that report, wherein he recommended a writ of mandamus be issued ordering the Industrial Commission to determine whether Goodyear Atomic Corporation (hereinafter Goodyear) is obligated to pay benefits to relator, Esto R. Miller, for violation of a specific safety requirement.

Relator was injured in the course of his employment with respondent Goodyear, having fallen from a scaffold on which he was standing while removing old pipe hangers. Miller was compensated for a fracture of the left ankle. Subsequently, Miller filed an application for an additional award for violation of a specific safety requirement. The Industrial Commission held a hearing and found that, because of the doctrine of federal preemption, they did not have jurisdiction to decide if the Code of Specific Safety Requirements was applicable to the Goodyear Portsmouth Gasseous Diffusion Plant. After rehearing was denied, relator requested a writ of mandamus ordering the commission to consider the application. The referee recommended the writ be issued and the commission and Goodyear have objected.

Respondents' objection to the referee's report is that he erroneously failed to find that federal law preempts state authority from considering the award of additional compensation to the employee for an alleged violation by Goodyear of a specific safety requirement. The federal law which the employer argues preempts state authority is the Atomic Energy Act of 1954. Section 2011 *et seq.*, Title 42, U.S. Code. Goodyear Atomic Corporation is a private corporation under contract with the Department of Energy pursuant to a section of this act, Section 2061, Title 42, U.S.

Code, to operate a nuclear production and enrichment facility known as the Portsmouth Gasseous Diffusion Plant. According to Goodyear, the land, buildings, equipment, supplies, raw material and final product are completely owned by the United States government. Goodyear argues that, because its plant is owned exclusively by the federal government, the doctrine of federal preemption precludes application of the specific safety requirements to them.

The doctrine of federal preemption has its roots in the Supremacy Clause of the United States Constitution. Clause 2, Article VI, United States Constitution, states:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *** shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The test for preemption has been variously expressed throughout the years. Congress may expressly preempt state authority in a given area. *Jones* v. *Rath Packing Co.* (1977), 430 U.S. 519. Absent express preemption, where state law conflicts or frustrates federal law or its objectives, federal law may supersede state law. *Florida Lime and Avocado Growers, Inc.*, v. *Paul* (1963), 373 U.S. 132. Additionally, if the scheme of federal regulation is so pervasive so as to leave no room for the states to supplement it, federal preemption may be found. *Rice* v. *Sante Fe Elevator* (1947), 331 U.S. 218. Most recently, the preemption doctrine was discussed in the context of the Atomic Energy Act in *Silkwood* v. *Kerr-McGee Corp.* (1984), ___ U.S. ___, 104 S.Ct. 615. In *Silkwood* an employee of Kerr-McGee allegedly was injured from contamination by plutonium exposure in defendant's plant. A tort action was commenced against Kerr-McGee, which owned the federally licensed and regulated nuclear plant where the injury occurred. The jury awarded compensatory and punitive

damages to plaintiff. Kerr-McGee appealed and the Court of Appeals for the Tenth Circuit reversed as to the punitive damages. The United States Supreme Court reversed, reinstated the punitive damage award, and held that for federally licensed nuclear facilities, Congress has not evidenced an intent to occupy the field. Thus, "insofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standard or whether the imposition of a state standard in a damages action would frustrate the objectives of federal law." *Id.* at 626.

Comparing *Silkwood* to the instant case, the regulation allegedly in conflict with federal law, *i.e.* the specific safety requirement, is similar to the punitive damage award upheld in *Silkwood* in that penalties result when the employer's conduct falls below a state established acceptable level. Furthermore, the injury in *Silkwood* was caused by radiation which admittedly is closer related to the risks which Congress was trying to regulate in the Atomic Energy Act. Here the injury to Miller was a fractured left ankle as a result of falling off a scaffold. Relator seeks to assert before the Industrial Commission that the fall was caused by protruding parts from the scaffold in violation of the specific safety requirement found in Ohio workers' compensation law. However, the ankle injury had nothing whatsoever to do with, nor was it caused by, aspects of nuclear energy which Congress intended to control and regulate.

As noted, the facility in *Silkwood* was a privately owned, federally licensed nuclear power plant. Goodyear argues that, because the Portsmouth Gasseous Diffusion Plant is owned exclusively by the federal government, *Silkwood* is distinguishable since the federal government has preempted the field because Section 2061(b)(2)(c), Title 42, U.S. Code,

obligates Goodyear to comply with all safety security regulations provided by the Atomic Energy Commission. However, this language should be interpreted in the light of Section 2021, relating to cooperation with the states and the purpose which is safety in control of radiation hazards. The express preemption should be limited to safety and security concerning these types of hazards rather than unrelated safety hazards. There is no indication in the record that the Atomic Energy Commission has prescribed to Goodyear safety regulations concerning unrelated hazards such as scaffolding. Hence, we conclude that, as in *Silkwood*, the federal government has not evidenced an intent to occupy the entire field of safety in regard to federally owned plants which are leased under contract to private entities, but only to preempt the field as to radiation safety and security, both in operation and construction of the plant. Fortifying our conclusion is Section 2021(k), Title 42, U.S. Code, which is consistent with this conclusion, and states:

> **"State regulation of activities for certain purposes**
>
> "(k) Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."

In *Pacific Gas and Electric Co.* v. *State Energy Resources Conservation & Development Comm.* (1983), ___ U.S. ___,103 S.Ct. 1713, the Supreme Court pointed out that under the Atomic Energy Act of 1954, the federal government maintains complete control of the safety and nuclear aspects of energy generation, but that a state law which does not seek to regulate the construction or operation of a nuclear power plant is valid and not in conflict with or preempted by federal law. The court pointed out that the federal government has occupied the entire field of nuclear safety concerns and hence, the state may not

act in this field even in an area where the federal law is silent. Hence, a state safety regulation that was related to the operation or construction of a nuclear power plant that would in any way affect the operation or construction of the plant in regard to the stated purpose of the Atomic Energy Act, safety in control of radiation hazards, is invalid. State safety regulations lying outside this area of express preemption which do not frustrate the federal law or its purposes are not preempted.

Until it is clear that the federal government has preempted the field of safety regulation for safety hazards unrelated to radiation, or the nuclear aspects of energy generation, it is held that state specific safety regulations that give rise to an award for violation thereof are equally applicable to an entity that contracts with the federal government for operation of a nuclear power facility owned exclusively by the federal government. Otherwise, employees in the Goodyear Atomic plant would not have the protection against safety hazards unrelated to radiation that other employees in Ohio enjoy.

The objections to the referee's report are overruled.

The recommendation of the referee is adopted. The writ of mandamus ordering the Industrial Commission to consider the violation of the specific safety requirement is granted.

Writ of mandamus granted.

STRAUSBAUGH and WHITESIDE, JJ., concur.

THE INDUSTRIAL COMMISSION OF OHIO

Employee	Esto R. Miller	Claim No.	80-19975
Street and No.	Route 1, Box 111 JJ	Date of Injury	7-30-80
City	McDermott, OH 45652	Manual No.	9063
Employer	Goodyear Atomic Corp.	Risk No.	258953
Street and No.	P. O. Box 628		
City	Piketon, OH 45661		

This claim came on for hearing before Hearing Officer David R. Packer as provided for in Revised Code Section 4121.06 on claimant's Application for an Additional Award for Violation of Specific Requirement filed 10-24-80 and 12-22-80

Notices were mailed to the claimant, the employer, their respective representatives and the Administrator of the Bureau of Workers' Compensation not less than 14 days prior to this date.

It is the finding of the Hearing Officer that this claim has been recognized for: Fracture of left ankle.

It is the order of the Industrial Commission that claimant's Application for Additional Award for Violation of a Specific Safety Requirement filed October 24, 1980 and December 22, 1980 be denied for the reason that the Codes of Specific Safety Requirements adopted by the General Assembly and Industrial Commission may not be applied to the Portsmouth Gaseous Diffusion Plant under the doctrine of federal preemption.

The finding and order are based upon the report of James G. Johnson, Investigator, Division of

Safety and Hygiene, the evidence in the file, and the evidence adduced at the hearing.

CC: Claimant
Employer
Parker & Douthat
Law

FINDINGS MAILED: 3-8-83 dc

A Motion for Rehearing may be filed within thirty days of the receipt of this order in accordance with the provisions of 4121-3-20 (G) of the Rules of Procedure of the Industrial Commission.

7-13-82
cid Date of Hearing

/s/ DAVID PACKER
Hearing Officer

The above findings and order was approved and confirmed by the following members of the Commission by circulation:

Date of Approval

/s/ WILLIAM W. JOHNSTON,
Chairman

/s/ W. CRAIG ZIMPHER,
Chairman

Secretary

/s/ RAYMOND A. CONNOR,
Vice President

/s/ STEVEN A. HATTEN,
Vice Chairman

/s/ LEONARD T. LANCASTER,
Member

THE INDUSTRIAL COMMISSION OF OHIO

Record of Proceedings

Employee:	Esto R. Miller	Claim No.:	80-19975
Street & No.:	1519 Kendall Ave. Apt. 31	Date of Injury:	7/30/80
City:	Portsmouth, OH 45662	Manual No.:	9063
Employer:	Goodyear Atomic Corp.	Risk No.:	258953
Street & No.:	P.O. Box 628		
City:	Piketon, OH 45661		

This claim came on for hearing before Hearing Officer, Jeanine M. Repa, as provided for in the Industrial Commission Rule 4121-3-20-(G) on Claimant's Motion for Rehearing filed 4/5/83 from the order of 7/13/82, denying claimant's Application for an Additional Award for Violation of Specific Safety Requirement(s), findings mailed 3/8/83.

This claim has been recognized for: Fracture of left ankle.

The Hearing Officer finds that the Motion for Rehearing was not accompanied by new and additional proof not previously considered. Furthermore, a review of

1. the investigation report;
2. arguments made in writing on behalf of the claimant and of the employer, and
3. the decision of the Hearing Officer (with reasons outlined in the Interoffice-Communication dated 2/14/83)

failed to show an obvious mistake of fact.

The Motion for Rehearing does not meet the criteria outlined in the Industrial Commission Rule 4121-3-20(G) and it is, therefore, denied without further hearing.

FINDINGS MAILED: 8/3/83:yj
cc: Employer: Vorys, Sater & Assoc.
Claimant: Robert E. Tait
LAW

The above finding and order was approved and confirmed by the following members of the Commission by circulation:

W. CRAIG ZIMPHER, CHAIRMAN
STEVEN A. HATTEN, VICE CHAIRMAN
LEONARD T. LANCASTER, MEMBER
Hearing Officer

DATE OF HEARING: July 11, 1983
JMR:sdc

THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM
To wit: August 20, 1986
Case No. 85-1524

STATE OF OHIO, ex rel. ESTO R. MILLER,
Appellee,
v.
INDUSTRIAL COMMISSION OF OHIO, *et al.*,
Appellants.

JUDGMENT ENTRY

APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Franklin County, was considered in a manner prescribed by law. On consideration thereof, judgment of the Court of Appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellee recover from the appellants its costs herein expended; and that a mandate be sent to the Court of Appeals to carry this judgment into execution; and that a copy of this entry be certified to the Court of Appeals for Franklin County for entry.

/s/ FRANK D. CELEBREZZE
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this date _____.

/s/ JAMES WM. KELLY CLERK

/s/ DANIEL J. CROWLEY DEPUTY

THE SUPREME COURT OF OHIO

COLUMBUS

1986 TERM

To wit: August 20, 1986

Case No. 85-1524

STATE OF OHIO, ex rel. ESTO R. MILLER,
Appellee,

v.

INDUSTRIAL COMMISSION OF OHIO *et al.*,
Appellants.

MANDATE

To the Honorable Court of Appeals.

Within and for the County of Franklin, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution.

Judgment of the Court of Appeals is affirmed consistent with the opinion rendered herein.

COSTS:

Filing Fee, $20.00, paid by Vorys, Sater, Seymour & Pease.

/s/ FRANK D. CELEBREZZE
FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this date ———.

/s/ JAMES WM. KELLY CLERK

/s/ DANIEL J. CROWLEY DEPUTY

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 85-1524

THE STATE OF OHIO *ex rel.* MILLER,

Appellee,

v.

INDUSTRIAL COMMISSION OF OHIO, *et al.*,
GOODYEAR ATOMIC CORPORATION,

Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Goodyear Atomic Corporation, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Ohio, affirming the court of appeals' issuance of a writ of mandamus, entered in this action on August 20, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

VORYS, SATER, SEYMOUR AND PEASE

/s/ ROBERT E. TAIT
ROBERT E. TAIT
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6341

Counsel for Appellant Goodyear Atomic Corporation

PROOF OF SERVICE

I, Robert E. Tait, a member of the Bar of the Supreme Court of the United States, hereby certify that on this *27th* day of October, 1986, in compliance with Rule 28.3 of the Supreme Court of the United States, copies of this Notice of Appeal in the above-entitled case were mailed, first-class postage prepaid, to the following:

Stewart R. Jaffy
Stewart, Jaffy, Livorno, Kaufmann
& Arnett Co., L.P.A.
21 East State Street
Columbus, Ohio 43215
Counsel for appellee Esto R. Miller

Anthony J. Celebrezze, Jr.
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43215
Counsel for appellants Industrial
Commission of Ohio and Administrator,
Bureau of Worker's Compensation

I further certify that all parties required to be served have been served.

VORYS, SATER, SEYMOUR AND PEASE

/s/ ROBERT E. TAIT
ROBERT E. TAIT
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6341

Counsel for Appellant Goodyear Atomic Corporation

IN THE SUPREME COURT
OF THE STATE OF OHIO

84AP208
No. 85-1524

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/s/ ROBERT E. TAIT
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6341

Counsel for Appellant Goodyear Atomic Corporation

Ohio Administrative Code § 4121:1-5-03(D)(2)

Manually propelled mobile work platforms (ladder stands) and rolling scaffolds (towers)

Manually propelled mobile work platforms (ladder stands) and rolling platforms (towers) shall support at least four (4) times the designed working load. The assembled components of all mobile work platforms (ladder stands) and rolling platforms (towers) shall provide a factor of safety of not less than four (4). Exposed surfaces shall be free from sharp edges, burrs, or other projecting parts.

Bureau of Workers' Compensation

APPLICATION
for payment of Compensation
and Medical Benefits

Claim Number (B.W.C. use only)

This form is to be used where the injury causes more than SEVEN DAYS of Disability
This form applies for both medical benefits and lost time compensation
The EMPLOYEE must complete and sign Part I
The EMPLOYER must complete and sign Part II
Only one copy of this form should be filed
The completed form should be sent to: Bureau of Workers' Compensation, Claims Section, Columbus, Ohio 43215

Part 1 (*To be filled out by employee)—Please Print or Type*

Employee's Name	Social Security Number
Esto Ray Miller	276-38-8456
Home Address (number & street)	Telephone No. & Area Code
Rt. #1 Box 446A	614-353-5111
City, County, State, Zip Code	Sex
Lucasville, Ohio 45648 Scioto County, Ohio	☐ Male ☐ Female

Marital Status	Birth Date	Age	Number of Dependents
Married	12-9-41	38	2

Employer's Name	Employer's Telephone No.
Goodyear Atomic Corporation	614-289-2331
Employer's Address (street & number)	Division
P.O. Box 628	
City, County, State, Zip Code	Plant
Piketon, Pike County, Ohio 45661	

Your Occupation (job title)	Length of time on job, on which injuries curred	Depart-oc-ment
Maintenance chanic	Me-3 weeks	714

List former employers you worked for, from 12 months prior to date of injury (attach additional sheet if needed)
Former Employer Name
Worked From (date)
Worked To (date)
Total Wages
No. Wks.
Attach Proof of wages received (copy on W-2, letter from Employer, etc.)

Date & Time of Accident	Date & Time Reported to Employer	Last Worked	Date Returned to Work
	7-30-80 1039	7-30-80	

Accident Location (street, number, city and state)
Department of Energy, Piketon, Ohio

Was Accident actually on Employer's premises?
x Yes _No

Witness' Names, Addresses and Phone Nos. (attach additional sheet if needed

R.A. Green, Rt. 2 Teays Valley, Minford, Ohio-B.R. Rider, 205 Forsythe St. Piketon, Ohio H. Howard, 510 Town St., Waverly, O

Hospital—if any (Name, Address, City, State, Zip Code)
614-453-2531

Scioto Memorial Hospital, 1805-27th Street, Portsmouth, Ohio 45662

Attending Physician (Name, Address, City, State, Zip Code, Phone No.)

Hector V. Soto, M.D., 1010 24th Street, Portsmouth, Ohio (614-354-6631)

Representative—if any (Name, Address, City, State, Zip Code, Phone No.)

Describe Accident: In detail describe the events which resulted in the injury. What happened? How did it happen? Name objections or substances involved and how they were involved.

I was on a high horse letting the side rails down. As I let it down the rail caught my glove and flipped me over the side (approximately 8' in the air). I landed on my left side of my leg and I rolled.

Give exact nature of injuries (amputation, laceration, fracture, etc.) and exact parts of body affected (first joint of left finger, right lower leg, lower right side of back, etc.)

Nature of injury	Part of Body	Nature of Injury	Part of Body
1. Fracture	Left Ankle	3.	
2. _____	_____	4. _____	_____

Have you ever filed a previous application for this injury..... ☐Yes ☐ No
Did you receive your wages during disability?
..... ☐Yes ☐No less w.c..
Have you filed any other claims with the Bureau or Ind. Comm. ..... ☐Yes ☐ No

READ CAREFULLY BEFORE SIGNING

I hereby apply for recognition of my claim under the Ohio Workers' Compensation Act for inquiries which I did not purposely self-inflict and request payment as provided under the Act.

By signing this application I expressly waive all provisions of few which forbid any person or persons who heretofore have or who hereafter may medically attend, treat or examine me or who may have information of any kind which may be used to render a decision in my claim, from disclosing such knowledge or information to the Bureau of Workers' Compensation or the Industrial Commission.

To expedite this claim, if it is allowed, I waive any notices to which I may be entitled for hearings. Direct payment to the provider of any medical services is authorized.

1._____	x _____
(If applicant signs by mark, two witnesses must sign here)	Signature of applicant (if unable to sign, make mark)
2._____	Date 8-4-80

EMPLOYER'S REPORT OF INDUSTRIAL INJURY

Part II (*To be completed by all employers) Please print or type*

Name of Employer (must be exactly as shown on the Certificate of Coverage)	Telephone
Goodyear Atomic Corporation	614-289-2331
Office Address (number, street, city, state, zip)	Federal I.D. or Social Security No.
P.O. Box 628, Piketon, Ohio 45661	
Nature of Business (i.e., farming, coal mining, etc.)	S.I.C. Number (if known)
Manufacturing	
Type of Organization (corporation, partnership, etc.)	Risk No. (refer to last payroll report)
Corporation	258953
Employer's Representative if any (give name and telephone no.—include area code)	Manual No. (refer to in-last payroll report)
	9063

The following is a worksheet to compute the employee's AVERAGE WEEKLY WAGE for the year immediately prior to the date of injury. Use total gross earnings, make no deductions for Social Security, Retirement Pensions, Insurance, Unemployment Compensation, etc.

12 Month Average Wage preceeding injury date:	413.11
Normal Full Weekly wage for "Current Work-sheet"	405.40

If employee did not work on all of the weeks during any period shown above, state reason(s)—(personal, plant shutdown, other injury, illness, etc.)

Employee was off work from 5-3-79 thru 12-16-79 due to work stoppage.

If meals, lodging, tips, etc. were received in addition to wages, DESCRIBE AND STATE WEEKLY VALUE.

Will Employee receive any wages, meals, lodging, health and accident benefits from policies fully paid for by the Employer, or any other employee benefits during period of disability.....x Yes _ No
less Workers' Compensation

Part III (*To be completed by Public Employers Only*)
Employee was a....
☐ Regular employee ☐Charity Worker ☐Retail Worker ☐Other

Type of jurisdictions (i.e., state, county, city, township, school district)

Did employee receive sick leave wages during disability
☐ yes ☐ no.....if yes From _____ To _____
PART IV (This section must be completed) READ CAREFULLY BEFORE SIGNING

By signing below I hereby certify that I have authority to execute this Employer's Report and that the answers given in this Employer's Report are correct to the best of my information and belief.

CHECK WHICHEVER APPLIES

Full Certification
The Employer further certifies that the facts set forth in this application are correct and the claim is valid. The Employer hereby waives notice of receipt from the Bureau of Workers' Compensation of this claim application and also waives notice of the first order of compensation made herein, provided in O.R.C., 4123.512-513, in order that the claim, if found to be compensable under the Ohio Workers' Compensation Act, may be promptly paid.
☐ Partial Certification
The Employer questions the validity of some aspect(s) of this claim and lists the points of contention in the space provided below.

Original Signed By
W.T. WASHAM, M.D.
(Signature)

W.T. WASHAM, M.D. 8-11-80
(Name of person signing report) (Date)
Medical Director
(Official title of persons signing and Department)

Points of contention _____

(Attach additional sheet if needed)

AMENDMENT TO FORM C-8-5M-3-64

DATED DECEMBER 31, 1980

This form is only to be used in cases where it is alleged that a specific requirement was violated by the employer. This application should be filed prior to the filing of Application for Compensation (Form C-1, C-80, C-87). Applications for additional awards must be filed in duplicate within 2 years after date of injury.

Workmen's Compensation

The Industrial Commission of Ohio

Claims Section

Name ESTO RAY MILLER
Claim No. 80-19975

Application for Additional Award for Violation of Specific Requirement
NON-FATAL INJURY

The application herein, ESTO RAY MILLER says that he has filed the above numbered claim with the Industrial Commission of Ohio, and applied for an award as shown by the records of said Commission.

Said applicant hereby makes application for an additional award because of the failure of the employer named herein to comply with a specific requirement for the protection of the lives, health and safety of employees.

In support of this application, said applicant hereby alleges that:—

1. He sustained an injury on the 30th day of JULY 1980 at 10:25 A.M.
2. While employed by GOODYEAR ATOMIC CORPORATION of P.O. BOX 628 Street PIKETON, OHIO 45661
(Street and Number) (City)
3. The following injury was sustained: Fractured left ankle, crushed and dislocated Left Heel.

4. Said injury was sustained in the following manner: I was working on a scaffold, known as a "Highhorse". I was working in a squatting position lowering the handrails over the end of the "Highhorse" scaffold, a long bolt that was sticking out of the hinge caught my glove and the weight of the handrails caused me to flip over the end of the scaffold, falling approx 7 feet to the concrete floor.
5. Said injury was sustained while applicant was engaged in doing: Removing old piping in Recovery Area X-705 Building.
6. Said employer named herein violated the following specific requirement which caused the applicant to sustain said injury: Section 4121:1-5-03 Ladders and Scaffolds Section D Paragraph (2) Page # 41 of The Ohio Administrative Code.
7. The names and addresses of persons who witnessed the accident and are familiar with the violation of said specific requirements are: H. Howard—510 Town Street, Waverly, Ohio 45690
R.A. Green—Route 2 Teays Valley, Minford, Ohio 45653
B.R. Rider—205 Forsythe Street, Piketon, Ohio 45661

Wherefore said applicant requests that said claim be reheard by said Commission and that an additional award be granted due to the failure of said employer to comply with the above named specific requirement.

State of Ohio, County of _____ ss.:

_____, being first duly sworn, says that the facts stated in the foregoing application are true.

_____
(Applicant will sign here)

_____
(Address)

Sworn to and before me this _____
day of _____ 196 _____

(Notary Public)

GOODYEAR ATOMIC CORPORATION
P.O. BOX 628
PIKETON, OHIO 4561
PHONE: 614-289-2331

January 28, 1981
GAT-010-81-12

State of Ohio
The Industrial Commission of Ohio
Legal Section
Columbus, OH 43215

Attention Ms. Dolores J. Russell

Gentlemen:

CLAIM NO. 80-19975—ESTO R. MILLER

We have received your notification, dated December 31, 1980, that Esto R. Miller's Claim No. 80-19975 has been filed with the Industrial Commission of Ohio under the provisions of Article IV, Section 35, of the Constitution, an "Amended" Application for Additional Award for Violation of Specific Safety Requirement.

The scaffold, which is noted in Mr. Miller's claim, No. 80-19975, is a "High-Horse" mobile ladder stand-type of scaffold.

The "High-Horse" scaffold (S/N 73301 and GAT No. 18-03386) was inspected by the Safety Department and found to be in a satisfactory condition. Routine inspections of this type of equipment are performed on an annual basis.

The guardrails comply with the following Codes and Standards:

1. ANSI A92.1—American National Standard for Manually Propelled Mobile Ladder Stands and Scaffolds (Towers)

2. Ohio Administrative Code 4121:1-5, Part 03—Ladders and

Scaf-
folds

3. OHSA Safety and Health Standards 29 CFR 1910, Part 29—Manually Propelled Mobile Ladder Standards and Scaffolds (Towers)

The claim specified that the equipment violates Ohio Administrative Code, Section 4121:1-5-03, Paragraph (1), Article (a), which pertains to ladders. This paragraph does not relate at all to the piece of equipment on which this man was injured. The correct reference for that mobile scaffold is 4121:1-5-03, Section (D), Paragraph (2). The mobile ladder stand on which the man was injured meets or exceeds all requirements of 4121:1-5-03, Paragraph 2, and did at the time the injury occurred:

The accident was investigated immediately following the incident by a qualified engineer. His report states that the cause of the accident was that the employee did not follow the correct procedure.

Mr. Miller attempted to dismantle the scaffold in an elevated position instead of first lowering it to the floor. As such, the main cause of the accident was an unsafe act on the part of the employee.

Very truly yours,

GOODYEAR ATOMIC CORPORATION

C. M. HUTCHINGS
C.M. Hutchings, Administrator
Medical, Safety & Environment

JPS:gmb:mob

cc R.B. Boeye
(GAT's Contract and
Legal Administrator)
E.R. Miller

FOREMAN'S REPORT OF ACCIDENT

THIS FORM MUST BE COMPLETED AND FORWARDED TO SAFETY DEPARTMENT IMMEDIATELY AFTER NOTIFICATION OF ACCIDENT.

NAME	BADGE NO.	DEPT.	SHIFT
MILLER, E.R.	6755	71A	D
LOCATION OF ACCIDENT (Be Specific)		TIME	DATE
THE RECOVERY		Illegible	7/30/80
WAS ACCIDENT CAUSED BY		FAILURE TO USE SAFETY DEVICE?	☐
		FAILURE TO FOLLOW SAFETY RULE?	☐
		NEITHER	☐

DESCRIBE ACCIDENT: Mr. Miller was lowering the side hand rails of a High Horse when a bolt used as a hinge caught on his coverings of cuff on his gloves causing him to loose his balance, fell to floor, landed on his feet and slid out from under him causing a break in the left foot.

UNSAFE ACT OR CONDITION: The condition called for assistance from another mechanic on the floor to receive the side rails as they were lowered.

WHAT PREVENTIVE ACTION HAS BEEN TAKEN: Bolts were to long, will be shortened but this probably would not have prevented this particular incident. Illegible.

DATE	SIGNATURE OF FOREMAN
7/30/87	R.L. NELSON

USE REVERSE SIDE FOR ADDITIONAL INFORMATION

ACCIDENT/INCIDENT INVESTIGATION REPORT

INJURY: ☐ Chargeable ☐ Potential ☐ Non-Chargeable ☐ Other Chargeable

NAME OF INJURED
E.R. Miller

JOB TITLE AND DEPT. NO.
Maintenance Mechanic, Dept. 714

AGE
38

BADGE
6755

CLASSIFICATION OF ACCIDENT
Lost Workday Case

DIVISION
700

SUPERVISOR
A.L. Nelson

CO. SERVICE IN CLASS
5 1/2 years

PRESENTTOTAL COMPANY SERVICE
5 1/2 years

NATURE OF INJURY
Broken left ankle

ACCIDENT TYPE
Fall

DESCRIPTION OF EQUIPMENT/ESTIMATED DAMAGE OR LOSS

NAMES OF WITNESSES
H. Howard, 6247—J. Greene, 7147

High Horse—Equipment No. 18-03326—Ser. No. 73381

LOCATION OF ACCIDENT
X-705, Recovery, Col. A14

DATE AND TIME
7-30-80 — 10:23 A.M.

DETAILED REPORT

Injured was lowering the guardrail on a High Horse ladder stand, Ser. No. 73381, GAT No. 18-03326, when his glove caught on a bolt, and as the guardrailing swung forward it pulled him off the platform. He fell approximately 6 feet to the floor. The stand was missing two bolts on the left side guardrails at the time of the accident but they were replaced prior to the investigation by B. R. Rider, 6803. No other defects were noted at the time of the accident. The accident was a result of an unsafe act in that the injured employee was attempting to lower the guardrailing from the platform.

Recommendations:

1. Employees should be instructed to lower these guardrails from the floor level and use a helper on either side.

2. Employee should be instructed to not repair, replace, or move any equipment involved in an accident unless given the OK by the Safety Department or other investigating official.

This instruction should be given at D-714 next scheduled safety meeting.

M.D. DIMICELI
M. D. Dimiceli
Safety Engineer

MD:gmb
8-04-80
cy A. L. Nelson

February 6, 1981

TO WHOM IT MAY CONCERN:

On February 5, 1981, I (G. K. Sleighter, OCAW Safety Representative) was asked by J. Parker to locate, inspect, and give my opinion as to the safety hazards involved when lowering the hand railings on a particular telescoping work platform. This particular platform, according to a witness, was the one from which E. R. Miller fell on July 30, 1980. It is my understanding that E. R. Miller was drug off of the platform while lowering the hand railing.

I went to the area where the accident occurred and was able to locate the work platform through H. Howard, who was a witness to the accident. The following information identifies the work platform:

Manufacturer—High Horse
Model—XK-1
Serial #—#73381
GAT #—#18-03326

Platofrm 6' 10" from floor in low position—will rise to 16'
Size of platform is 22 3/8" x 48"

Mr. Howard explained the operation for lowering and raising the hand rails, and also how E. R. Miller was drug from the platform. A long bolt had been used to replace a hinge pin on the right side of the railing. As the railing was swinging down from the raised position. The bolt caught his right arm and drug him from the platform.

My inspection of the hand-railings revealed the following conditions that in my opinion needed immediate correction.

1. The left side of the hand-railing was missing a section.
2. The right side of the hand-railing had bolts for hinge pins. These bolts were approximately

twice as long as necessary and were bent in the shape of a "V" which produced two hooks in the same location where Mr. Miller had been caught when his accident occurred.

I immediately contacted A. L. Nelson, (Maintenance Supervisor) and asked him to either "tag out" the platform so it would not be used, or make immediate corrections to the hand railings. He assured me he would take care of the situation.

In my opinion, the following rules must be followed to be reasonably safe when raising or lowering the hand-railing.

1. Never attempt the operation with the telescoping platform in any other than the completely lowered position.
2. Never attempt the operation without help from at least one other person.
3. The hand-railings must be maintained in such a condition that "catch" points are eliminated.

/s/G. K. SLEIGHTER
G. K. Sleighter
OCAW Safety Representative

THE INDUSTRIAL COMMISSION OF OHIO

In the Matter of:

Claimant: Esto R. Miller
Route 1, Box 111JJ
McDermott, OH 45652

Claim No.: 80-19975

Date of Injury: 7/30/80

Employer: Goodyear Atomic Corp.
P.O. Box 628
Piketon, OH 45652

Manual No.: 9063
Risk No.: 258953

STIPULATION OF FACT

The attached five photographs demonstrate the self-propelled, high-horse, ladder stand, of the type involved in the accident of Mr. E.r. Miller in the subject claim. These photographs were taken subsequent to the accident and were staged.

Attachment A demonstrates the ladder stand fully extended.

Attachment B demonstrates a proper hinge pin on the guardrail and how the rail folds forward on the hinge pin.

Attachment C shows a bolt substituted for the pin; but not necessarily in the same condition as the bolt at the time of the accident.

Attachment D demonstrates the manner in which Mr. E. R. Miller was lowering the platform at the time of the accident.

Attachment E demonstrates two men lowering the platform. The platform is 6 feet, 10 inches above the ground in the lowered position.

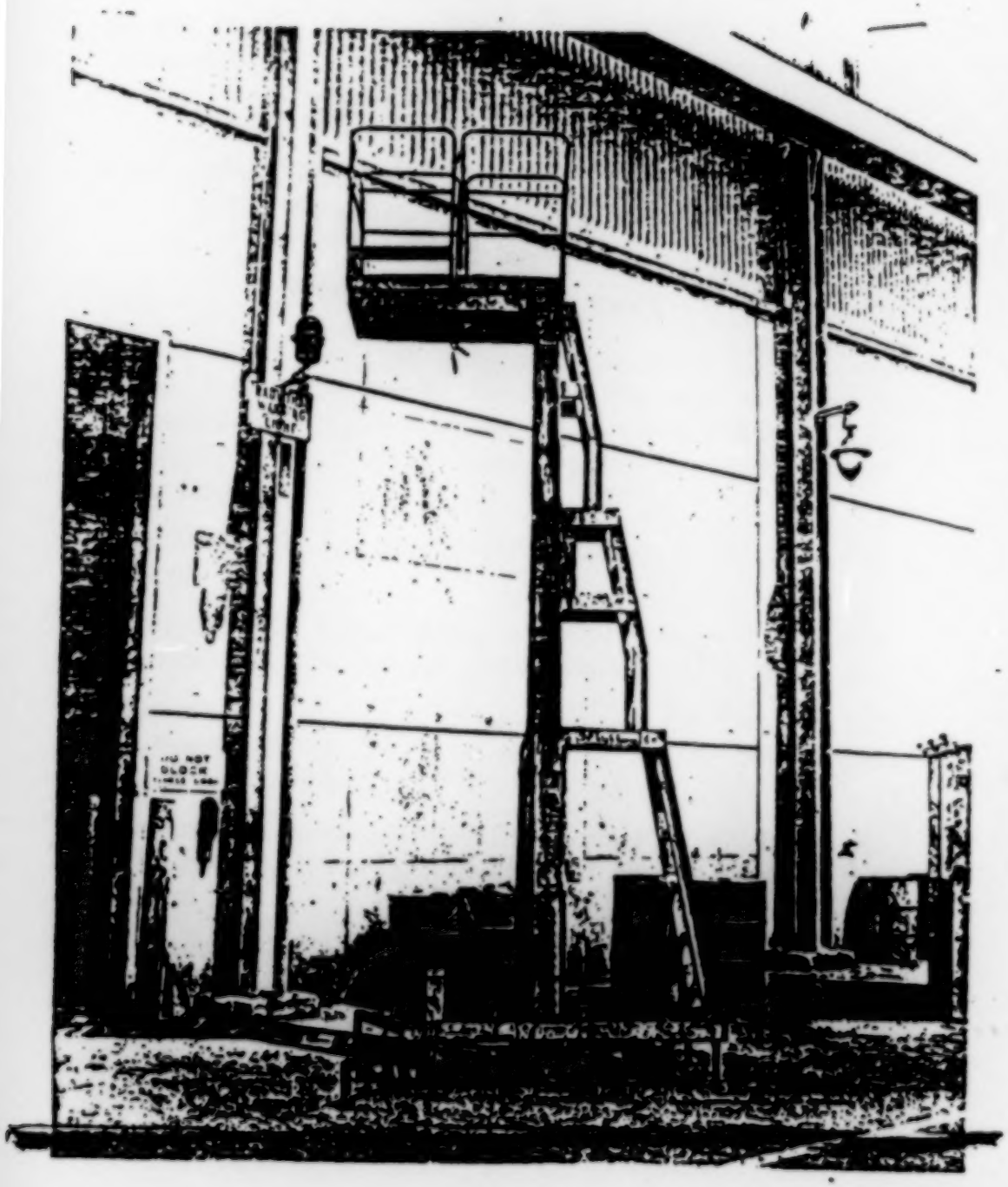
The foregoing facts are stipulated to between the Employer and the Claimant.

/s/E. R. MILLER
E. R. Miller
Claimant

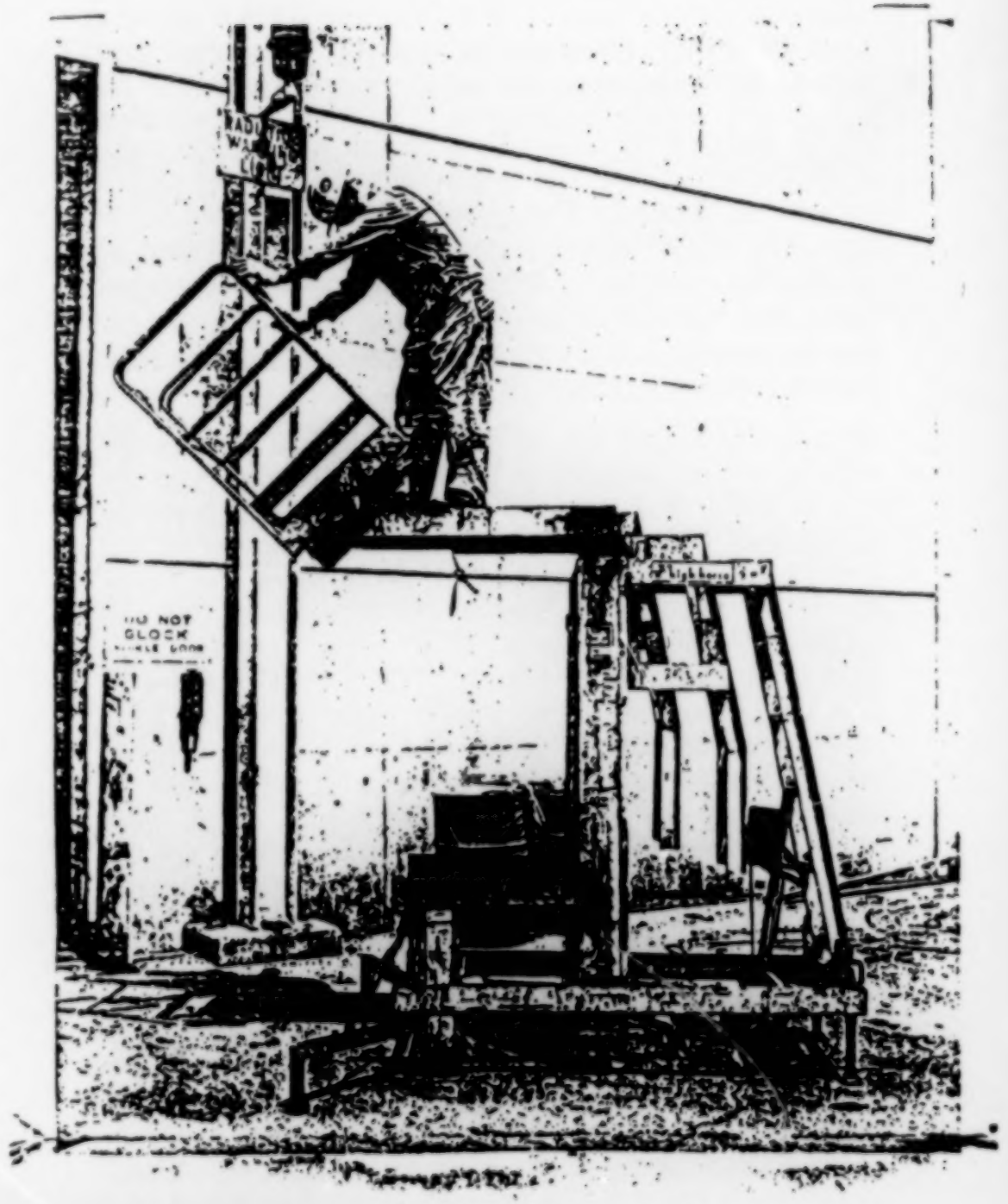
/s/ JAMES T. PARKER
James T. Parker
Claimant's Representative

/s/ NEAL ROUNTREE
Neal Rountree
Attorney, Employer

Attachments



ATTACHMENT A



ATTACHMENT D

BEST AVAILABLE COPY

HISTORY OF OCCUPATIONAL HEALTH AND SAFETY AT DOE FACILITIES

DOE's program of occupational health and safety regulation at its facilities was begun 43 years ago by DOE's predecessor agencies. The history of that program is replete with congressional recognition and endorsement of the practice of exclusive federal regulation of occupational health and safety at those facilities.

BACKGROUND - MANHATTAN ENGINEERING DISTRICT REGULATION

In 1943, the United States was compelled to develop and produce nuclear weapons in order to assure victory in the Second World War. In order to achieve this goal, a special organization, the Manhattan Engineering District of the War Department was established. Since there was no industrial infrastructure to support the development and production of nuclear weapons, in a "crash" program, the Manhattan Engineering District (MED) built facilities at sites throughout the United States. These comprised a national industrial complex dedicated to the national defense. These facilities built for the research of, production of materials for, and production of the Atomic Bomb, were operated under cost-plus-fixed-fee contracts which are the predecessors of the management and operating contracts, under which DOE research, production, and defense facilities are operated today.

In 1943, there was no federal statutory framework for regulation of occupational health and safety. Nor did any state have a comprehensive program for workers' safety at that time. However, it was clear to the progressive commanders of MED that there was a need for such federal regulation at the facilities where materials for nuclear weapons and the weapons themselves were produced. Accordingly, a program of federal regulation of occupational

health and safety was established at these facilities through inclusion in MED contracts of an accident prevention clause requiring the contractor to take steps to protect the lives and health of workers in accordance with requirements established by the MED's contracting officers.

REGULATION BY THE AEC UNDER THE ATOMIC ENERGY ACT OF 1946

Subsequent to the conclusion of the World War, Congress determined that it was necessary to turn matters related to nuclear research and nuclear weapons over from military to civilian control. In order to do this, it enacted the Atomic Energy Act of 1946. P. L. 585, 79th Cong., 50 Stat. 755-75 (1946). In accordance with the terms of the Act, in 1947, under Executive Order No. 9816, 12 Fed. Reg. 37 (1947), the MED turned control of its facilities, and assigned the contracts for the management of those facilities, over to the Atomic Energy Commission (AEC) which was created by that Act. For the first time, through § 4(c)(2)(b) of the Act, an agency of the Federal Government was granted express statutory authority to issue and assure compliance with safety regulations at facilities involved in the production of fissionable materials. Throughout the period of AEC management of its facilities, occupational health and safety continued to be regulated by the Federal Government through its contracts, and the contracts evolved through a process of accretive modifications from the MED construction contracts to something approaching the modern management and operating contract of today.

On October 13, 1952, the AEC entered into a letter contract with GAT, in anticipation of entry into a definitive management and operating contract which was to be negotiated. Under the contract, GAT was required to participate in the development of a Government-owned gaseous diffusion plant for the enrichment of uranium which was to be located in Pike County, Ohio, approxi-

mately 22 miles north of Portsmouth, Ohio. The terms of the letter contract were, like those in all letter contracts of that time, very general.

REGULATION BY THE AEC UNDER THE 1954 ACT

Today, the Portsmouth Gaseous Diffusion Plant enriches and refines feed materials to assays which may be used for civilian energy and national defense purposes. It, and DOE's Gaseous Diffusion Plant at Paducah, Kentucky, are the only such facilities currently operating in the United States. It is the sole operation with the capacity to enrich uranium to an assay which is required by the United States Navy to power its nuclear ships and submarines. Due to the obvious national security considerations involved, the design and technology utilized is highly classified and access to the plant is severely restricted.

While the Plant was being built, GAT assisted in the Plant's development and continued to perform work under its letter contract, as amended, until January 21, 1957, when it entered into a definitive management and operating contract, designated Contract No. AT-(33-2)-1, Mod. No. 3. Under Article XVII of that contract, *Safety, Health, and Fire Protection-Permits*, GAT was bound to "comply with all health, safety, and fire protection regulations and requirements (including reporting requirements) of the Commission." It is clear from the contract clause that the AEC intended to regulate nonradiological as well as radiological safety through its regulations at the Portsmouth facility for the production of fissionable material. The clause was inserted in accord with agency practice and to meet congressional requirements which were set forth in the Atomic Energy Act of 1954 at Section 41(b)(2)(c).

When the Portsmouth Gaseous Diffusion Plant began to operate under its new contract in 1957, the activities of that facility were governed by the Atomic Energy Act of 1954. P. L. 83-703, 68 Stat. 919 (1954); 42 U.S.C. 2011 *et seq.* The Congressional purposes of the Atomic Energy

Act of 1954 fell into two broad categories. First, the Atomic Energy Act of 1954 was enacted so as to provide additional congressional guidance for, and more extensive authorities with respect to, activities of the AEC which were being accomplished under the Act of 1946, to include those then planned for the Portsmouth Gaseous Diffusion Plant. The second category of purposes related to the establishment of the framework and mechanism for the development, licensing, and regulation of private nuclear power plants. To a great extent, these two sets of purposes were furthered by provisions set forth in separate portions of the U.S. Code by the 1954 Act. Most of the statutory provisions related to nuclear power plant licensing and regulation are set forth in Subchapter IX of Title 42 Chapter 23, 42 U.S.C. 2131 *et seq.* Within the AEC itself, a separate division was set up to license and regulate nuclear power plants. Other offices and divisions governed the other AEC activities.

The Commission's authority to own and operate facilities for research, weapons production and materials processing is based upon Section 161(e) of the Act. 42 U.S.C. 2201(e). The AEC's authority to prescribe and enforce radiological occupational health and safety at its facilities was established by Section 161(b) of the Act. The Commission's authority to prescribe and enforce nonradiological health and safety standards and regulations at its facilities was separately established by Section 161(i)(3) of the Atomic Energy Act of 1954, which authorized it to

> "prescribe such regulations or orders as it may deem necessary ... (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operations facilities used in the conduct of such activity in order to protect health and minimize danger to life or property." 42 U.S.C. 2201(i).

In providing his views to the Joint Committee on Atomic Energy during the hearings on S. 3323 and H. R. 8862, the precursors of the Atomic Energy Act of 1954, Commissioner Joseph Campbell expressed the intent of the AEC on the inclusion of Section 161 in the Act:

> "§ 161(i) expressly gives the Commission authority to prescribe enforceable regulations and orders to . . . provide additional health and safety protection in connection with any activities authorized pursuant to the Act. This provision is essential to carry the purposes of the Act." (Hearings before the Joint Committee on Atomic Energy, 83rd Cong. 2nd Sess, June 2, 1954 at p. 601).

Section 41(a) mandated that the Commission be the exclusive owner and operator of all nuclear production facilities. 42 U.S.C. § 2061. With respect to facilities used for the production of fissionable materials, Congress required in Section 41(b)(2)(C), that any "contract entered into" for the purpose of operating such a production facility would "contain provisions . . . obligating the contractor . . . to comply with all safety and security regulations which may be prescribed by the Commission." Thus, the Congress expressly recognized the AEC's practice of regulating both radiological and nonradiological health and safety at its facilities through regulations enforceable under its contracts and required its continuation. The clause currently in the Goodyear contract, descendant of the Safety, Health, and Fire Protection Clause in the 1957 contract, is incorporated so as to meet the Congressional requirement set forth in 41(b)(2)(C) as follows:

> The corporation shall take all reasonable precautions in the performance of the work under this contract to protect the safety and health of employees and of members of the public and *shall comply with all applicable safety and health regulations and requirements* [*including reporting requirements*] *of DOE*. . . .

> *In the event that the corporation fails to comply, with said regulations or requirements of DOE, the contracting officer may, without prejudice to any other legal or contractual rights of DOE, issue an order stopping all or any part of the work;*. . . Article XX, Contract No. DE-AC05-760R00001 (Emphasis added).

This clause is typical of such provisions which govern DOE's plants nationwide.

Standards and regulations prescribed by the AEC, were required by Congress to regulate both radiological and nonradiological health and safety at its facilities. They were set forth in the Atomic Energy Commission Manual, at Chapters 0501, 0502, 0504, 0505, 0510, 0513, 0521, 0524, 0526, 0527, 0528, 0529, 0530, 0540, 0544, 0545, 0550, 0552, 0553, 0555, and 0560. These standards and regulations were applied only to facilities owned and operated by the United States under the authority of the AEC. They were not applied at civilian nuclear power facilities licensed and regulated by the AEC's licensing division. Accordingly, while nonradiological health and safety was always regulated by the Federal Government at facilities owned or controlled by the AEC and its successors, they were not so regulated by the Federal Government at private facilities which were merely licensed by the AEC and for which statutory requirements were different. Thus, in accord with statute and through the issuance of regulations, the AEC completely occupied the field with respect to regulation of nonradiological health and safety at facilities owned or controlled by it.

Despite this, certain state administrative bodies did, at times, raise questions with respect to certain safety related-matters at those facilities. The AEC uniformly held to the position that the doctrine of federal preemption granted it and its contractors immunity with respect to activities conducted by AEC management contractors. With respect to matters such as collection and remission of sales

taxes, it was possible to arrive at cooperative arrangements with the states. However, with respect to matters related to occupational health and safety, conflict was avoided by state administrative recognition of the Government's immunity from regulation by the state, through state withdrawal from enforcement efforts. Hiestand and Florsheim, The AEC Management Contract Concept, 29 Fed. F.J. 67, 78-79 (1969). It was consistent with this long-established pattern that the Industrial Commission of Ohio initially held, prior to the decision of the Ohio Court of Appeals in this case, that it did not have jurisdiction to regulate health and safety at the Portsmouth Gaseous Diffusion Plant. Prior to July 1985, no state had ever attempted, either by judicial or administrative proceeding, to enforce its own health and safety regulation on any facility owned by the AEC or its successor agencies.

SUBSEQUENT STATUTORY DEVELOPMENTS

That Congress intended for the AEC to fully occupy the field of occupational safety and health regulation at facilities such as the Portsmouth Plant, under the Atomic Energy Act, is further evidenced by amendments to the Act enacted in 1959. P. L. 86-373, 73 Stat. 688 (1959) (currently codified at 42 U.S.C. § 2021). The amendment permitted the AEC to enter into agreements with states for certain facilities which were regulated and licensed by it. Such facilities, at which the AEC never regulated non-radiological health and safety, were not owned or operated by the AEC. It was made clear in the amendment embodied in § 2021, that no agreement with a state entered into by authority of that amendment could include provisions authorizing state regulation of the "construction or operation of any production . . . facility," such as the Portsmouth Plant. 42 U.S.C. § 2021(c). The provisions of § 2021, permitting some state regulation within an area formerly regulated by the AEC, upon agreement, were meant solely for "AEC licensees." S. Rep. No. 870, 86th

Cong., 1st Sess., *rep'd* in 1959 U.S. Cong. and Admin. News 2872, 2815, 2819, and 2882 (1959). In view of this, it is clear that Congress did not intend to permit any disturbance of exclusive regulatory jurisdiction of occupational health and safety at AEC-owned facilities, even by agreement.

On December 29, 1970, the President signed into law the Occupational Safety and Health Act of 1970 (OSHA). That law became effective on April 28, 1971. OSHA authorized the United States Department of Labor (DOL) to regulate health and safety nationally. It further authorized the Department of Labor to approve state plans for the regulation of workplaces within the respective state jurisdictions and to thus permit occupational safety and health regulation by the states. However, pursuant to § 4(b)(1) of OSHA, Congress specifically exempted from regulation by the Department of Labor "working conditions of employees" which were regulated by the AEC at its facilities. 29 U.S.C. 653(b)(1). This exemption also renders ineffective the waiver of federal preemption of state regulation set forth in § 18 of the Act. See, 29 U.S.C. 667.

The statutory exemption was explicitly recognized by Secretary of Labor Brennan, in correspondence between the AEC and the Department of Labor which was written in late 1973 and early 1974. In that correspondence, the head of the agency responsible for interpretation of OSHA recognized that within OSHA was an expression of congressional intent that the AEC exclusively regulate health and safety at facilities owned or leased by it. In a letter dated February 4, 1974, to the Chairman of the AEC, Secretary Brennan requested that the AEC provide a list specifying such facilities. On May 14, 1974, the AEC produced such a list. The Portsmouth Plant was listed as one of the 71 facilities in 23 states and one United States territory which comprised the AEC complex.

RECENT ORGANIZATIONAL DEVELOPMENTS AND REGULATION

On August 15, 1974, Congress passed the Energy Reorganization Act of 1974. P. L. 93-438, 88 Stat. 1233, 42 U.S.C. § 801 *et seq.* (1974). In that Act, Congress created the Energy Research and Development Administration and the Nuclear Regulatory Commission. Under Title II of that Act, authority to license and regulate private nuclear power plants and certain other facilities was transferred to the Nuclear Regulatory Commission from the AEC. Under Title I of that Act, control of and regulatory authority for AEC production facilities, as well as other functions, was transferred to the Energy Research and Development Administration. That Act explicitly created within ERDA the position of Assistant Administrator for Environment and Safety. P. L. 93-438 § 101(d). Congress did not intend for the person appointed to that position to be limited to oversight of radiological health and safety alone. Congress intended for that person "to ensure the establishment and enforcement of appropriate health, public safety and environmental protection standards *for all activities of the agency.*" S. Rep. 93-980, 1974 U.S. Cong. and Admin. News 5470, 5492 (1974). At present, DOE's Assistant Secretary for Environment, Safety and Health, Mary L. Walker, is heir to those statutory obligations and authorities.

Later, on August 4, 1977, Congress enacted the Department of Energy Organization Act which transferred the functions of the Energy Research and Development Administration to the newly created Department of Energy. P. L. 95-91, 91 Stat. 565 (1977). 42 U.S.C. 7100 *et seq.* Accordingly, those functions vested by law in the AEC and transferred to the Administrator of the Energy Research and Development Administration and the authorities vested in the Administrator of Energy Research and Administration and his subordinates by P. L. 93-938, were vested in the Secretary of Energy. 42 U.S.C. 7151. It is

under this authority that the Department of Energy, through DOE Orders 5481, 5482, and 5483, has promulgated comprehensive radiological and nonradiological standards applicable to its contractor operated facilities. These Orders, governing Safety Analysis and Review, DOE's Environmental Protection Safety and Health Protection Program, and the Occupational Safety and Health Program for DOE Contractor Employees At Government-Owned Contractor-Operated Facilities, are but the latest in an unbroken line of comprehensive safety requirements through which the Department of Energy and its predecessors have fully occupied the field of occupational health and safety regulation at federally owned or controlled facilities under their jurisdiction dating back to 1943. Through Order 5483, DOE regulates the configuration of scaffolding at those facilities.

4121-3-20 *ADDITIONAL AWARDS BY REASON OF VIOLATIONS OF SPECIFIC SAFETY REQUIREMENTS.*

(A) An application for an additional award of compensation founded upon the claim that the injury, occupational disease, or death resulted from the failure of the employer to comply with the specific requirement for the protection of health, lives, or safety of employees, must be filed, in duplicate, with the Industrial Commission, within two years of the injury, death, or inception of disability due to occupational disease. In death claims, the application shall be on "Form C-9" and in nonfatal cases, the application shall be on "Form C-8". Such applications should set forth the facts which are basis of the alleged the violation and shall cite the section or sections of the law or code of specific safety requirements which it is claimed have been violated. Such applications shall contain the claim number assigned by the bureau to the claim for compensation or benefits under chapter 4123. of the Revised Code.

(1) CLAIMANT OR HIS REPRESENTATIVE MAY SUBMIT AN AMENDMENT OF HIS APPLICATION FOR ADDITIONAL AWARD FOR VIOLATION OF A SPECIFIC SAFETY REQUIREMENT BEYOND THE EXPIRATION OF TWO YEARS FOLLOWING THE DATE OF INJURY, DISABILITY OR DEATH. ANY SUCH AMENDMENT MUST BE SUBMITTED WITHIN THIRTY DAYS OF THE RECEIPT BY CLAIMANT OR HIS COUNSEL OF THE REPORT OF THE INVESTIGATION BY THE INDUSTRIAL COMMISSION INTO THE ALLEGED SAFETY VIOLATION. CLAIMANT OR HIS COUNSEL MAY REQUEST AN EXTENSION OF THIS PERIOD FOR AN ADDI-

TIONAL THIRTY DAYS. SUCH REQUEST MUST BE SUBMITTED IN WRITING WITHIN THE ORIGINAL THIRTY DAY PERIOD. IF PROPERLY SUBMITTED THE INDUSTRIAL COMMISSION SHALL NOTIFY BOTH PARTIES AND THEIR REPRESENTATIVES OF THE GRANTING OF SUCH REQUEST BY MAIL. SUCH AMENDMENT SHALL SET FORTH ALL SPECIFIC SAFETY REQUIREMENTS OMITTED FROM APPLICATION MADE PRIOR TO THE EXPIRATION OF THE TWO YEAR PERIOD WHICH CLAIMANT BELIEVES WERE THE CAUSE OF THE INJURY, DISEASE OR DEATH, BUT WHICH WERE OMITTED BY REASON OF MISTAKE OR INCOMPLETENESS. COPIES OF ANY SUCH APPLICATION SHALL BE FORWARDED TO THE EMPLOYER AND ITS REPRESENTATIVES AS REQUIRED BY OAC 4121-3-20 (C). ANY SUCH AMENDMENT SHALL NOT RAISE ANY UNSTATED CLAIM, BUT SHALL MERELY CLARIFY A PREVIOUSLY ALLEGED VIOLATION.

(2)(a) ALL AMENDMENTS TO AN APPLICATION FOR ADDITIONAL AWARD FOR VIOLATION OF A SPECIFIC SAFETY REQUIREMENT FILED AFTER THE INVESTIGATION BY THE INDUSTRIAL COMMISSION SHALL BE REVIEWED TO DETERMINE IF THE AMENDMENT REQUIRES FURTHER INVESTIGATION.

(b) THE EMPLOYER OR ITS REPRESENTATIVE MAY OBJECT TO THE FILING OF AN AMENDMENT TO THE APPLICATION FOR ADDITIONAL AWARD FOR VIOLATION OF A SPECIFIC SAFETY REQUIREMENT BEYOND THE TWO YEAR PERIOD ON THE

GROUNDS THAT THE AMENDMENT RAISES A PREVIOUSLY UNSTATED CLAIM. IF SUCH OBJECTION IS FILED WITHIN THIRTY DAYS OF THE RECEIPT BY THE EMPLOYER OF THE AMENDMENT OR PRE-HEARING CONFERENCE, TO BE PROVIDED OVER BY A STAFF HEARING OFFICER SHALL BE SCHEDULED WITH PROPER NOTICE TO ALL PARTIES AND THEIR REPRESENTATIVES. THE PRE-HEARING CONFERENCE SHALL CONSIDER THE PROCEDURAL ISSUES RAISED BY THE AMENDMENT, AND IN PARTICULAR THE NEED FOR A RE-INVESTIGATION IF THE ORIGINAL INVESTIGATION WAS DONE PRIOR TO THE AMENDMENT.

(3) WHENEVER FURTHER INVESTIGATION IS PERFORMED BY THE INDUSTRIAL COMMISSION INTO AN ALLEGED SAFETY VIOLATION THE RECEIPT BY CLAIMANT OR HIS COUNSEL OF SUCH REPORT SHALL COMMENCE THE RUNNING OF A FURTHER PERIOD FOR SUBMISSION OF AMENDMENT OR NEW EVIDENCE AS IF THE RE-INVESTIGATION WERE THE FIRST INVESTIGATION.

(B) The commission may designate a staff hearing officer as a special referee to whom it may delegate such responsibilities as provided by law. The commission may assign personnel to assist such referee as required.

(C) Upon the filing of an application for an additional award with the commission. the commission shall send a copy of the application to the employer by certified mail, and to its authorized representatives by mail. The commission shall notify the employer that this application, if granted, will result in the employer being billed directly for the amount of the

award. The commission shall also notify the administrator by notifying the accounts section of the bureau of workers' compensation. The employer has thirty days in which to file an answer unless the time is extended, for good cause shown, by a staff hearing officer for a period not to exceed an additional thirty days.

(D) The commission may assign an application for such award for investigation or for hearing without investigation, if the application or answer raises legal issues the decision of which would dispose of the application. When an investigation has been made an an investigation report is completed, the commission shall mail a copy of such report to each of the parties and their authorized representatives. The commission shall advise each party that he has a designated period of time, not to exceed thirty days, in which to furnish additional proof that he may desire to offer or he may request a record hearing. WITHIN THIS PERIOD EITHER PARTY MAY REQUEST IN WRITING AN EXTENSION OF THE TIME WITHIN WHICH IT MAY SUBMIT ADDITIONAL PROOF. SUCH REQUESTS SHALL BE CONSIDERED BY A STAFF HEARING OFFICER AND, IF GRANTED, WRITTEN NOTICE OF THE EXTENSION, NOT TO EXCEED AN ADDITIONAL THIRTY DAYS, SHALL BE SENT TO BOTH PARTIES AND THEIR REPRESENTATIVES. ANY SUCH EXTENSION SHALL EXTEND THE TIME AVAILABLE FOR SUBMISSION OF ADDITIONAL PROOF EQUALLY TO BOTH PARTIES. If a record hearing is held, a stenographic transcript of any testimony offered shall be taken. The party requesting a record hearing shall pay for the stenographic services and shall submit a copy thereof for the claim file within thirty days of the hearing. Failure to file

a copy of the transcript of the proceedings within the thirty day period or within such an extended period as may be granted by the Staff hearing officer or by the industrial commission for good cause shown, shall not delay the rendering of the decision after the waiting period. If no request is made for such a hearing, no new evidence will be accepted at the hearing on the application. Within thirty days from the receipt of the investigation report, the claimant may amend his application to include any violation demonstrated by the investigation, but in no event more than two years from the date of injury.

(E) When new proof has been filed, or a request for a record hearing made, or the thirty-day period for the filing of new evidence has expired, the staff hearing officer shall review the file and the evidence, and determine the further course of action.

(1) If he determines that a record hearing is necessary as requested, he will make arrangements for the hearing and the issuing of subpoenas, if indicated. When he has received the transcript of the testimony, he shall send copies to the claimant and the employer (or to their representatives if they so designate).

(2) If no new proof has been filed, nor a request made for a record hearing and the thirty-day period, as provided in paragraph (D) above, has expired, the claim shall be set for hearing with notices to the parties, their representatives and the administrator, at which time the arguments in favor of and opposed to granting the application will be heard.

(3) If, at any time, the staff hearing officer determines further investigation is necessary, he will refer the claim for investigation requesting the specific date needed and notify the parties of the further investigation. When the supplemental investigation report

is in the file, copies are to be mailed to each of the parties and their authorized representatives.

(F) Following the hearing, the hearing officer shall reduce the recommended order to writing and submit it to the commission for its approval.

(1) If the commission approves the order, it shall adopt the order by vote of a majority of the commission and sign the order.

(2) If the commission does not approve the recommended order, it shall by a majority vote adopt such order as it deems appropriate.

(3) Copies of the order signed by the commission are to be mailed to all parties.

(G) Within thirty days of the receipt of the order of the commission deciding the issues presented by the application, either party has the right to file a motion requesting a rehearing, and furnish a copy to the opposing party. The opposing party has thirty days in which to file an answer.

(1) If the motion and answer are filed, a staff hearing officer, after the expiration of the answer time, shall review the same under the following criteria:

(a) In order to justify a rehearing of the commission's order, the motion shall be accompanied by new and additional proof not previously considered and relevant to the specific safety requirement violation.

(b) A rehearing may also be indicated in exceptional cases where the order was based on an obvious mistake of fact.

(2) If the motion for rehearing does not meet the criteria as outlined in paragraphs (G)(1)(a) and (G)(1)(b) preceding, the motion shall be denied without further hearing.

(3) If the motion for rehearing is granted, the staff hearing officer may:

(a) Set the claim for a hearing with notices on the merits of the application;

(b) Refer the claim for investigation and then set it for a hearing on the merits of the application.

(4) Following the hearing the staff hearing officer shall follow the same procedure pertaining to the recommended order as outlined in paragraph (F) of this rule. Such order, if approved by the commission, shall be final.

(5) The payment of the additional award shall be stayed during the pendency of the motion or rehearing.

(H) Settlements of violation applications shall be considered by the commission or its staff hearing officers either before the determination of the application or after it has been granted.

(1) Prior to the determination of the merits of the application.

(a) Joint application of the claimant and the employer on an agreed settlement shall be set for hearing before a staff hearing officer with notice to the parties but only after the investigation of the application has been made, unless in advance of the hearing a waiver of the notice of hearing has been filed by the parties. Thereafter, the staff hearing officer shall recommend to the commission action to be taken with regard to the settlement, and the commission shall issue its order approving or disapproving the settlement.

(b) When an application by the employer to settle its liability for the violation is made, the matter will be set for hearing before a staff hearing officer with notice to the claimant, the employer, their respective representatives and to the administrator of the bureau of workers' compensation. Following the hearing, the staff hearing officer shall recommend to the commission action to be taken with regard to the settlement, and the commission shall issue its order approving or disapproving the settlement.

(2) Settlement after granting an additional award.

(a) Joint application of the claimant and the employer on an agreed settlement shall be handled in the same manner as provided in paragraph (H)(1)(a) of this rule.

(b) When an application is made by the employer to settle its future liability for the violation, the staff hearing officer shall obtain from the accounts section the information of whether all assessments under the finding and order of the commission have been paid. If not, the amount of these assessments must be added to any amount determined as the future liability of the employer. Thereafter, the matter will be set for hearing before a staff hearing officer with notice to the employer, the employer's representative, and the administrator of the bureau. Following the hearing, the staff hearing officer shall recommend to the commission action to be taken with regard to the settlement, and the commission shall issue its order approving or disapproving the settlement.

(I) EVERY ORDER ADJUDICATING AN APPLICATION FOR ADDITIONAL AWARD FOR VIOLATION OF A SPECIFIC SAFETY REQUIREMENT WHICH FINDS SUCH A VIOLATION AGAINST AN EMPLOYER STILL IN BUSINESS IN OHIO, INCLUDING EVERY ORDER WHICH DENIES SUCH AN AWARD BY REASON OF THE ABSENCE OF A PROXIMATE CAUSAL RELATIONSHIP BETWEEN THE VIOLATION AND THE INJURY, OCCUPATIONAL DISEASE, OR DEATH, SHALL DIRECT THAT THE VIOLATION BE CORRECTED WITHIN

A TIME PERIOD WHICH THE ORDER SHALL SPECIFY. COPIES OF ALL SUCH ORDERS SHALL BE FORWARDED TO THE PARTIES OF RECORD.

(1) THE INDUSTRIAL COMMISSION SHALL, AS SOON AS PRACTICAL AFTER THE EXPIRATION OF THE TIME PERIOD GRANTED TO THE EMPLOYER TO CORRECT THE VIOLATION, INVESTIGATE TO DETERMINE IF THE VIOLATION HAS BEEN CORRECTED. THE FILING OF AN APPLICATION FOR REHEARING SHALL NOT STAY THIS INVESTIGATION OR ANY OTHER PROCEEDINGS UNDER DIVISION *(I)* THROUGH *(K)* OF THIS RULE, EXCEPT THAT NO EMPLOYER SHALL BE REQUIRED TO PAY ANY PENALTY ASSESSED DURING THE PENDENCY OF ANY APPEAL FROM A FINDING OF A PENALTY.

(a) WHERE THE EMPLOYER, OR ANY OF HIS AGENTS OR EMPLOYEES, REFUSES OR OBSTRUCTS THIS INVESTIGATION THE INVESTIGATOR SHALL PROMPTLY INFORM THE INDUSTRIAL COMMISSION WHICH MAY TAKE ACTION APPROPRIATE UNDER THE CIRCUMSTANCES TO COMPEL THE EMPLOYER TO CO-OPERATE WITH THIS INVESTIGATION. IN THE EVENT THE INDUSTRIAL COMMISSION DETERMINES THAT SUCH ACTION IS APPROPRIATE, IT MAY INFORM THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE REFUSAL OR OBSTRUCTION OF THE EMPLOYER TOGETHER WITH A REQUEST THAT THE DIRECTOR OF INDUSTRIAL RELATIONS INVOKE HIS AUTHORITY UNDER SECTION 4101.05 OF THE REVISED CODE TO COMPEL THE EMPLOYER TO CO-OPERATE WITH THE INVESTIGATION. ANY REPORT

RESULTING FROM SUCH INVESTIGATION BY THE DEPARTMENT OF INDUSTRIAL RELATIONS, WHEN FORWARDED TO THE INDUSTRIAL COMMISSION, SHALL BE TREATED AS IF THE INDUSTRIAL COMMISSION HAS PREPARED IT FOR ALL PURPOSES UNDER THIS RULE.

(b) WHERE THE INVESTIGATION INDICATES THAT THE EMPLOYER HAS FAILED TO CORRECT THE VIOLATION WITHIN THE SPECIFIED TIME PERIOD THE INDUSTRIAL COMMISSION SHALL PROMPTLY FORWARD A COPY OF THE REPORT OF THE INVESTIGATION TO THE EMPLOYER, ITS REPRESENTATIVES IF ANY, AND THE DEPARTMENT OF INDUSTRIAL RELATIONS.

(J) THE INDUSTRIAL COMMISSION SHALL MAINTAIN A LIST OF APPLICATIONS FOR ADDITIONAL AWARD FOR VIOLATION OF A SPECIFIC SAFETY REQUIREMENT. IN EACH CASE WHERE TWO VIOLATIONS HAVE BEEN FOUND AGAINST THE SAME EMPLOYER WITHIN THE SAME TWENTY-FOUR MONTH PERIOD THIS INFORMATION SHALL BE FORWARDED TO THE DEPARTMENT OF INDUSTRIAL RELATIONS.

(K) WHEN THE COMMISSION IS NOTIFIED AS REQUIRED BY DIVISION *(I)* OR *(J)* OF THIS RULE THEY SHALL SEE THAT ALL STEPS NECESSARY AND APPROPRIATE FOR SCHEDULING THE REQUIRED HEARING ARE TAKEN.

(1) THE INDUSTRIAL COMMISSION MAY DESIGNATE A STAFF HEARING OFFICER TO SIT AS ITS DEPUTY IN DETERMINING WHETHER AN EMPLOYER HAS FAILED TO COMPLY WITH AN ORDER TO CORRECT A VIOLATION

OR WHETHER AN EMPLOYER HAS VIOLATED SPECIFIC SAFETY REQUIREMENTS MORE THAN ONCE IN THE SAME TWENTY-FOUR MONTH PERIOD.

(2) AN EMPLOYER WHO HAS FAILED TO COMPLY WITH A CORRECTIVE ORDER WITHIN THE SPECIFIED TIME SHALL BE DEEMED TO HAVE VIOLATED A SPECIFIC SAFETY REQUIREMENT FOR THE PURPOSES OF REVISED CODE 4121.47. SHOULD THE EMPLOYER COMPLY WITH THE CORRECTIVE ORDER WITHIN THE TIME SPECIFIED NO VIOLATION OF THIS SECTION WILL BE FOUND IN THE ABSENCE OF A PROXIMATE CAUSAL RELATIONSHIP BETWEEN THE VIOLATION AND THE INJURY, OCCUPATIONAL DISEASE, OR DEATH.

(3) AN EMPLOYER SHALL BE ASSESSED A CIVIL PENALTY WHEN TWO VIOLATIONS OF SPECIFIC SAFETY REQUIREMENTS OCCUR WITHIN THE SAME TWENTY-FOUR MONTH PERIOD UNDER THE FOLLOWING CIRCUMSTANCES:

(a) IF THE TWO VIOLATIONS OF SPECIFIC SAFETY REQUIREMENTS OCCUR AT THE SAME WORK PLACE, THE VIOLATIONS NEED NOT BE OF THE SAME TYPE OR KIND FOR A PENALTY TO BE ASSESSED. HOWEVER, IF THE TWO VIOLATIONS OF SPECIFIC SAFETY REQUIREMENTS OCCUR AT TWO DIFFERENT WORK PLACES OWNED, OPERATED, MANAGED, LEASED OR OTHERWISE CONTROLLED BY THE SAME INDIVIDUAL, COMPANY OR CORPORATION, THE VIOLATIONS MUST BE

FOR THE SAME SPECIFIC SAFETY REQUIREMENTS.

(b) A PENALTY SHALL NOT BE ASSESSED SOLELY FOR MULTIPLE VIOLATIONS WHICH CAUSED THE SAME INCIDENT, OR INCIDENTS WHERE MORE THAN ONE EMPLOYEE WAS INJURED OR KILLED.

(c) FOR THE PURPOSE OF DIVISION *(I)* THROUGH *(K)* OF THIS RULE: WORKPLACE SHALL MEAN ALL OF A SINGLE CONTIGUOUS FIXED SITUS UNDER THE CONTROL OF THE EMPLOYER WHERE WORK IS PERFORMED; OR, IF THE VIOLATION TOOK PLACE AT OR EN ROUTE TO OR FROM A WORK SITE TO WHICH THE EMPLOYER SENT EMPLOYEES TO PERFORM WORK BUT WHICH WAS NOT EXPECTED TO REMAIN INDEFINITELY UNDER THE CONTROL OF THE EMPLOYER, ANY WORK SITE OR TRAVEL ROUTE TO OR ALONG WHICH EMPLOYEES BASED OR SUPERVISED FROM THE SAME SITE HAVE BEEN SENT TO PERFORM WORK, INCLUDING SUCH BASE SITE.

(d) FOR THE PURPOSE OF DIVISION *(I)* THROUGH *(K)* OF THIS RULE: SAME SPECIFIC SAFETY REQUIREMENT SHALL MEAN THE IDENTICAL REQUIREMENT, BUT THIS EXCEPTION SHALL NOT PREVENT A PENALTY WHERE THE EMPLOYER IS FOUND TO HAVE VIOLATED THE PROVISIONS OF TWO REQUIREMENTS IN EFFECT FOR DIFFERENT PERIODS OF TIME WHICH COVER THE SAME MATTERS, EVEN THOUGH ONE OF

THE REQUIREMENTS IS STRICTER THAN THE OTHER.

(4) SETTLEMENT OF AN APPLICATION FOR ADDITIONAL AWARD FOR VIOLATION OF A SPECIFIC SAFETY REQUIREMENT PRIOR TO ADJUDICATION SHALL BE TREATED AS A FINDING OF NO VIOLATION FOR THE PURPOSE OF THIS RULE.

(5) NO PENALTY SHALL BE ASSESSED UPON AN EMPLOYER FOR VIOLATION OF MORE THAN ONE SPECIFIC SAFETY REQUIREMENT WITHIN THE SAME TWENTY-FOUR MONTH PERIOD UNLESS BOTH OF THE VIOLATIONS TOOK PLACE ON OR AFTER AUGUST 22, 1986.

(6) WHERE AN EMPLOYER IS FOUND TO HAVE VIOLATED SPECIFIC SAFETY REQUIREMENTS MORE THAN ONCE IN THE SAME TWENTY-FOUR MONTH PERIOD, THE EMPLOYER SHALL BE ASSESSED A CIVIL PENALTY APPROPRIATE IN LIGHT OF THE CIRCUMSTANCES OF THE INDIVIDUAL CASE IN AN AMOUNT NOT TO EXCEED $50,000.00. AMONG THE FACTORS THE INDUSTRIAL COMMISSION SHALL CONSIDER IN DETERMINING THE AMOUNT OF ANY SUCH CIVIL PENALTY ARE THE SIZE OF THE EMPLOYER AS MEASURED BY THE NUMBER OF EMPLOYEES, ASSETS AND EARNINGS OF THE EMPLOYER. IN ALL CLAIMS AS A CONSEQUENCE OF WHICH ANY CIVIL PENALTY IS FOUND THE EMPLOYER SHALL BE INELIGIBLE FOR THE REIMBURSEMENTS OTHERWISE PROVIDED FOR UNDER SECTION 4123.343, 4123.515 AND 4123.63 OF THE REVISED CODE.

(L) THE INDUSTRIAL COMMISSION SHALL REFER VIOLATION INFORMATION TO THE DEPARTMENT OF INDUSTRIAL RELATIONS WHEN AN EMPLOYER FAILS TO MAINTAIN A SAFE WORK ENVIRONMENT BY REPEATED OR PERSISTENT VIOLATIONS OF APPLICABLE SPECIFIC SAFETY REQUIREMENTS.

EFFECTIVE DATE: AUGUST 22, 1986

I HEREBY CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF RULE 4121-3-20.

/s/ ROBERT L. ROBBINS
ROBERT L. ROBBINS

PROMULGATED UNDER: R.C. CH. 119
RULE AUTHORIZED BY: R.C. SEC. 4121.13
RULE AMPLIFIES: R.C. SEC. 4121.46, R.C. SEC.4121.131 PURSUANT TO SECTION 35 OF ART. II OF THE OHIO CONSTITUTION, 4121.13, 4121.35, 4123.05.
PRIOR EFFECTIVE DATE: 10-17-68, 1-10-78, 11-26-79, 7-7-82

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

Dec. 7, 1973

Chairman Ray
Commissioner Larson
Commissioner Doub
Commissioner Kriegsman
Commissioner Anders

APPLICABILITY OF SECTION 4 (b)(1) OF THE OCCUPATIONAL SAFETY AND HEALTH ACT TO WORKING CONDITIONS OF AEC CONTRACTOR-EMPLOYEES WORKING IN GOVERNMENT-OWNED, CONTRACTOR-OPERATED FACILITIES

On December 29, 1970, the President signed into law the Occupational Safety and Health Act of 1970 (OSHA). The law became effective on April 28, 1971.

OSHA requires that every employer (any person engaged in a business affecting commerce who has employees) except the United States or any State or political subdivision of a State to "(1) furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees, and (2) . . . comply with occupational safety and health standards promulgated" by the Secretary of Labor in accordance with certain specified procedures. In this connection, the Secretary was required by April 28, 1973, to promulgate by rule as an occupational safety and health standard any national consensus standard and any established Federal standard unless he determines that the promulgation of such standard would not result in improved safety or health. Standards already issued under the Walsh-Healey

Public Contracts Act (41 U.S.C. §35), the Service Contract Act (41 U.S.C. §351), the Construction Safety Act (40 U.S.C. §333), the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §941), and the National Foundation on Arts and Humanities Act (20 U.S.C. §951), are also deemed occupational safety and health standards issued under OSHA until superseded by corresponding standards promulgated under OSHA.

Section 4 (b)(1) of OSHA provides that "[n]othing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

This section has been interpreted by both the Department of Labor and the Atomic Energy Commission as rendering the Act inapplicable to the working conditions of employees of AEC contractors and AEC licensees with respect to radiological occupational safety or health, or to Agreement State licensees with respect to the occupational radiological safety or health connected with "Agreement materials."

This interpretation is founded upon the Atomic Energy Commission's authority under section 161 (b) of the Atomic Energy Act of 1954, as amended, to prescribe and enforce radiological occupational health and safety. Section 161 (b) provides:

> "In the performance of its functions the Commission is authorized to...
>
> "b. establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to pro-

mote the common defense and security or to protect health or to minimize danger to life or property."

Section 4 (b)(1) can also be interpreted as rendering the Act inapplicable to the working conditions of AEC contractor-employees working in Government-owned, contractor-operated facilities with respect to which the Atomic Energy Commission prescribes or enforces occupational nonradiological safety or health standards or regulations. The Commission's authority to prescribe and enforce such nonradiological safety and health standards and regulations is based upon section 161 (i)(3) of the Atomic Energy Act of 1954, as amended. Section 161 (i)(3) provides:

"In the performance of its functions the Commission is authorized to. . .

"i. prescribe such regulations or orders as it may deem necessary . . . (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property."

In providing its views to the Joint Committee on Atomic Energy during Hearings on S. 3323 and H.R. 8862, the precursors of the Atomic Energy Act of 1954, as amended, Commissioner Joseph Campbell expressed the intent of the Atomic Energy Commission on the inclusion of section 161 (i) in the Act:

"Section 161 (i) expressly gives the Commission authority to prescribe enforceable regulations and orders to . . . provide additional health and safety protection in connection with any activities authorized pursuant to the Act. This provision is essential to carry out the purposes of the Act." [Hearings before the Joint Committee on Atomic

Energy, 83d Cong., 2d Sess., June 2, 1954 at p. 601]

Section 161 (i)(3) thus authorizes the Commission to prescribe health and safety regulations for any activity authorized by the Act. This would include such activities as research and development relating to nuclear and nonnuclear processes; production and distribution of source material, special nuclear material, byproduct material, and atomic weapons; and regulation of production and utilization facilities and source material, special nuclear material and byproduct material. This subsection must be interpreted, moreover, as authorizing the Commission to prescribe enforceable nonradiological occupational health and safety regulations for such activities in view of the fact that section 161 (b) covers radiological occupational health and safety and Congress would not have attempted to cover precisely the same subject matter in two separate subsections of the same statutory section.

Since the Act's enactment on August 30, 1954, the Atomic Energy Commission has in fact prescribed and enforced comprehensive radiological and nonradiological occupational safety and health standards for those AEC contractor-employees working in its Government-owned, contractor-operated facilities. These standards are prescribed in the Atomic Energy Commission Manual and are currently found in AECM 0501, 0502, 0504, 0505, 0510, 0513, 0521, 0524, 0526, 0527, 0528, 0529, 0530, 0540, 0544, 0545, 0550, 0552, 0553, 0555 and 0560. These standards are specifically enforced by AEC in its contracts with those employers that operate or perform work for the AEC in Government-owned facilities. This is done through AEC's standard "safety, health and fire protection" clause:

"The contractor shall take all reasonable precautions in the performance of the work under this contract to protect the health and safety of employees and of members of the public and to min-

imize danger from all hazards to life and property, and shall comply with all health, safety, and fire protection regulations and requirements (including reporting requirements) of the Commission. In the event that the contractor fails to comply with said regulations or requirements of the Commission, the Contracting Officer may, without prejudice to any other legal or contractual rights of the Commission, issue an order stopping all or any part of the work; thereafter a start order for resumption of work may be issued at the discretion of the Contracting Officer. The contractor shall make no claim for an extension of time or for compensation or damages by reason of or in connection with such work stoppage."

In view of the foregoing, it seems quite clear that section 4 (b)(1) renders OSHA inapplicable to the working conditions of AEC contractor-employees working in Government-owned or -leased, contractor-operated facilities as long as AEC continues to prescribe and enforce radiological and nonradiological occupational safety and health standards.

/s/ MARCUS A. ROWDEN
MARCUS A. ROWDEN
General Counsel

Jan. 2, 1974

Honorable Peter J. Brennan
Secretary of Labor

Dear Mr. Secretary:

We are pleased to learn from your letter of October 31 that you share our desire for an arrangement between our two agencies that will safeguard to the maximum possible extent the safety and health of contractor employees working in the Atomic Energy Commission's (AEC) government-owned or -leased (GOCO) establishments. We believe that we have established a means for implementing the respective responsibilities of the Department of Labor (DOL) and the AEC with respect to safety and health matters involving these employees that will use the government's resources in the most effective manner.

As you are aware, AEC is fully committed to a viable comprehensive occupational safety and health program at these GOCO facilities. This program involves regular AEC inspections and meaningful enforcement of both radiological and nonradiological occupational safety and health standards which are compatible with those prescribed by the Occupational Safety and Health Act of 1970 (OSHA). As a result, the occupational safety and health experience at these GOCO facilities is one of the best in the nation. In this connection, the latest National Safety Council survey of its members indicates that the all-industry frequency rate (the number of disabling injuries per million man hours worked) for 1972 was 10.17 while the all-industry severity rate (the number of days charged per disabling injury per million man hours worked) for 1972 was 655. This should be contrasted with the 1972 experience in AEC's GOCO facilities of a 1.33 frequency rate and a 411 severity rate.

We have sought to continue this program in such a manner as to achieve maximum worker protection with minimum duplication of effort. After numerous discussions between our respective staffs, it has become clear that the most

effective way to achieve these objectives is for AEC to assert its express statutory authority in this area and apply section 4(b)(1) of OSHA. Enclosed herewith is an opinion of the General Counsel of the Commission which provides the legal basis for this course of action (Enclosure 1). This opinion has been adopted by the Commission as an official AEC position.

Therefore, in order to accomplish the common desires of our two agencies, we will continue to prescribe and enforce occupational radiological and nonradiological safety and health standards for AEC contractor employees working in GOCO facilities. You will note from our implementing directive (Enclosure 2), that AEC is prescribing and enforcing OSHA standards in connection with this program.

It is our understanding that the Letter of Understanding executed on May 11, 1964, with respect to the delineation of responsibility between AEC and DOL as to the enforcement of the Walsh-Healey Public Contracts Act in GOCO facilities (Enclosure 3) shall continue in effect.

Sincerely,

Signed
/s/ DIXY LEE RAY
Chairman

Enclosures:
1. Memo to Commission from Marcus A. Rowden, General Counsel, dtd.12/7/73 (copy)
2. IAD - Sub: Occupational Safety and Health Program Applicable to AEC Contractor-Operated, Government-Owned or -Leased Fac.
3. Letter of Understanding, dtd. 5/11/64 (copy)

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SECRETARY
WASHINGTON
Feb. 4, 1974

Honorable Dixy Lee Ray
Chairman
U. S. Atomic Energy Commission
Washington, D. C. 20545

Dear Madam Chairman:

This is in response to your letter of January 2, 1974, in which you assert that the Atomic Energy Commission possesses and exercises express statutory authority, which by operation of law under the terms of section 4(b)(1) of the Williams-Steiger Occupational Safety and Health Act of 1970 (OSHA), would preclude the application of OSHA to working conditions of private AEC contractors performing contractual operations in facilities owned or leased by the AEC.

Among other documents, you enclosed in your letter a memorandum of law signed by the AEC General Counsel, Mr. Marcus Rowden, in which he developed the AEC's interpretation that the Atomic Energy Act of 1954, as amended, precluded the application of OSHA as I described it in the paragraph above. Mr. Rowden relies principally on section 161(i)(3) of the 1954 AEC Act which provides:

> In the performance of its functions the Commission is authorized to . . .
>
> (i) prescribe such regulations or orders as it may deem necessary . . .(3) to govern any activity authorized pursuant to the Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of

such activity, in order to protect health and minimize danger to life or property.

Mr. Rowden included some legislative history plus arguments that the above section makes it clear in the Commission's view that section 4(b)(1) of OSHA by operation of law renders OSHA inapplicable to the working conditions of AEC contractor employees working in Government-owned or -leased contractor operated facilities as long as, and to the extent that, AEC prescribes and enforces both radiological and nonradiological occupational safety and health standards.

We requested the legal memorandum from the AEC General Counsel for the fundamental and critical reason that the Department of Labor possesses no authority to interpret the provisions of statutes administered and enforced by other agencies, or conversely and more specifically, that the AEC has the primary responsibility and prerogative of interpreting the terms of the Atomic Energy Act of 1954, as amended, which it enforces and administers.

While we lack the authority to interpret the AEC statute we may, of course, make a judgment in this matter as it relates to section 4(b)(1) of OSHA. In our judgment the AEC General Counsel's memorandum is a clear and reasoned presentation of your agency's interpretation of the germane provision of the Atomic Energy Act. We accept the conclusion reached in the memorandum of the AEC General Counsel that section 161(i)(3) of the Atomic Energy Act of 1954, as amended, would, as interpreted by Mr. Rowden, preclude the application of OSHA by operation of law under the terms of section 4(b)(1) of OSHA to the extent that the AEC issues safety and health standards and enforces those standards under its contractual authority pursuant to the AEC statute.

I note that in your regulations contained in the Immediate Action Directive, dated December 20, 1973, you include OSHA Construction Safety Standards (29 CFR Part 1926).

We assume that AEC would enforce these standards as to that type of construction activity which would be performed in already occupied AEC-owned or -leased facilities, but would not enforce these standards in the case of construction activity conducted in initial construction of the facility to be owned or to be leased by AEC after the construction. My assumption is based on the fact that initial construction activity is not related to the uses to which the facility will later be put by the AEC-GOCO contractors. Therefore, such initial construction activity is not within the ambit of your interpretation of the AEC statutory authority. If my assumption is not in accord with your views, please let me know. However, my raising this question does not affect our understanding of the AEC General Counsel as to the nonapplication of OSHA to the other GOCO operations which I have already fully discussed.

Again, in an effort to reply to you as quickly as possible without raising delaying issues, I would agree that the former Labor Department-AEC agreement as to Walsh-Healey cooperation is still essentially viable. We must, however, bring the former agreement up to date in order to reflect changes brought about by the enactment of OSHA. This new version of the former agreement involves only minor technical changes, so I will not hold up my response because of minor legal matters that can be handled later between our respective legal staffs.

Before closing, I would also request that you furnish us with a list specifying all AEC-GOCO contractors to whose working conditions OSHA does not apply under the terms of your interpretation of the AEC Act. Unless we have such a list, we cannot ascertain the parameters of the jurisdiction you assert for AEC.

Sincerely,

/s/ PETER J. BRENNAN
Secretary of Labor

UNITED STATES

ATOMIC ENERGY COMMISSION

Washington D.C. 20545

May 14, 1974

Heads of Divisions and Offices, HQ
Managers of Field Offices
Managers of PNR and SNR
THROUGH: Director, Division of Naval Reactors, HQ

GOCO FACILITIES

Enclosed is a list of GOCO facilities over which the AEC will continue to exercise statutory authority for occupational safety and health. The Division of Operational Safety (OS) recommends that managers of field offices review this list and determine, in accordance with IAD 0504-33 D.3.a., if additional facilities should be included. If you determine that other facilities should be included, please submit your additions, along with justifications, to OS by June 3, 1974. It should be noted that offices which have only Federal employees are not included in the list. These facilities come under Section 19 of the Occupational Safety and Health Act and are governed by AECM 0507.

For those facilities which are not to be added to the enclosed GOCO list, OS recommends that managers of field offices initiate the necessary action toward removing the health and safety clause (AECPR 9-7.5006-47) from the applicable contracts. Generally, it is expected that small offsite AEC contract activities will be conducted in accord with appropriate state or U.S. Department of Labor occupational safety and health regulations and the radiological safety will be subject to AEC or state licensing. In some cases it may be necessary to give special consideration to modifying the health and safety contract clause to cover radiological safety for AEC contractors that op-

erate AEC-owned radiation producing equipment in states that do not have radiation safety programs. Offsite facilities using source, special nuclear, or byproduct materials, which have been specifically exempted from AEC or state licensing, should also use a modified safety clause covering only radiological safety.

In general, support contractors (i.e., construction, architect-engineers, services, etc.), are not listed. It is intended, however, that when working at the listed facilities, such contractors would also be covered by IAD 0504-33. Thus, the standard clause (AECPR 9-7.5006-47) should continue to be used in these contracts.

If there are questions concerning this matter, please contact David E. Patterson of my staff.

/s/ MARTIN B. BILES
MARTIN B. BILES, Director
Division of Operational Safety

Enclosure:
GOCO List

California

1. a. Lawrence Berkeley Laboratory, University of California Berkeley

   b. Donner Laboratory, University of California Berkeley

   c. Chemical Biodynamics Laboratory, University of California Berkeley

   Principal Contractor:
   University of California
   Berkeley, California 94720

2. a. Lawrence Livermore Laboratory, University of California
   End of East Avenue
   Livermore

   b. Lawrence Livermore Laboratory -- Site 300
   17 miles east of Livermore on Corral Hollow Road
   Livermore

   Principal Contractor:
   University of California
   P.O. Box 808
   Livermore, California 94550

3. Sandia Laboratories, Livermore
   End of East Avenue
   Livermore

   Principal Conractor:
   Sandia Laboratories
   Livermore, California 94550

4. a. Liquid Metal Engineering Center
   AEC Triangle at Santa Susana
   Canoga Park

   b. Liquid Metal Engineering Center
   Two AEC-owned buildings, total about

5000 feet^2, outside AEC triangle
Canoga Park

Principal Contractor:
Atomics International
P.O. Box 1449
Canoga Park, California 91304

5. Stanford Linear Accelerator Center
   2572 Sand Hill Road
   Menlo Park

   Principal Contractor:
   Stanford University
   P.O. Box 4349
   Stanford, California 94305

6. 2801 Old Crow Canyon Road
   San Ramon

   Principal Contractor:
   EG&G, Inc.
   P.O. Box 204
   San Ramon, California 94583

Colorado

1. Rocky Flats Plant
   25 miles northwest of Denver -- Highway 93
   Between Boulder and Golden

   Principal Contractor:
   Dow Chemical USA
   P.O. Box 888
   Golden, Colorado 80401

2. AEC Compound
   Grand Junction

   Principal Contractor:
   Lucius Pitkin, Inc.

P.O. Box 1889
Grand Junction, Colorado 81501

Connecticut

1. Knolls Atomic Power Laboratory
Windsor Site
Windsor

Principal Contractor:
General Electric Company
P.O. Box 545
Windsor, Connecticut 06095

Florida

1. Pinellas Plant
5 miles southeast of Largo on Bryan Dairy and Belcher Roads
St. Petersburg

Principal Contractor:
General Electric Company
P.O. Box 11508
St. Petersburg, Florida 33733

Hawaii

1. a. 531 Ohohia Street
Honolulu, Oahu

b. Trailer Complex and Warehouse (T-3059)
Hickam Air Force Base
Honolulu, Oahu

c. Assembly Building and Warehouse
Barber's Point
Naval Air Station, Oahu

d. Transmitter Station
Mauna Kapu, Oahu

Principal Contractor:
Holmes & Narver, Inc.
P.O. Box 9186
Honolulu, Hawaii 96820

2. Sandia Laboratories
Barking Sands, Kauai

Principal Contractor:
Sandia Laboratories
P.O. Box 478
Waimea, Kauai, Hawaii 96796

3. Communications and Scientific Station
Haleakala, Maui

Principal Contractor:
Sandia Laboratories
Pacific Area Support Office
P.O. Box 9186
Honolulu, Hawaii 96820

Idaho

1. National Reactor Testing Station
40 miles west of Idaho Falls on U.S. Highway 20

Principal Contractors:

Aerojet Nuclear Company
550 Second Street
Idaho Falls, Idaho 83401

Allied Chemical Corporation
550 Second Street
Idaho Fails, Idaho 83401

Argonne National Laboratory
P.O. Box 2528
Idaho Falls, Idaho 83401

Westinghouse Electric Corp.
P.O. Box 2068
Idaho Falls, Idaho 83401

2. a. 550 Second Street and Annex
Idaho Falls

b. Second and third floors of Rogers Building
478 Shoup Avenue
Idaho Falls

c. Computer Science Center
1155 Foote Drive
Idaho Falls

d. Monte Wight Building
500 Block West Broadway
Idaho Falls

Principal Contractor:
Aerojet Nuclear Company
550 Second Street
Idaho Falls, Idaho 83401

Illinois

1. Argonne National Laboratory
9700 South Cass Avenue
Argonne

Principal Contractor:
Argonne University Association
P.O. Box 307
Argonne, Illinois 60439

2. National Accelerator Laboratory
Off Kirk Road on west boundary
Batavia

Principal Contractor:
University Research Associates, Inc.
2101 Constitution Avenue
Washington, D.C. 20037

Iowa

1. Ames Laboratory, Iowa State University
Reactor Building -- Scholl Road

Physics Addition Building
Lab & Office Building
Spedding Hall -- Spammell Drive
Metallurgy Building -- Spammell Drive
Metals Development -- Spammell Drive
Warehouse Building -- Maintenance Area
Mechanical Maintenance -- Maintenance Area
Painting & Air Conditioning Shops -- Maintenance Area
Ames

Principal Contractor:
Iowa State University
Ames, Iowa 50010

2. Burlington Plant
(Part of Iowa Army Ammunition Plant) 10 miles west of Burlington on U.S. Highway 34
Burlington

Principal Contractor:
Mason & Hanger -- Silas Mason Co., Inc.
P.O. Box 561
Burlington Iowa 52601

Kentucky

1. Paducah Gaseous Diffusion Plant
Paducah

Principal Contractor:
Union Carbide Corporation
P.O. Box 1410
Paducah, Kentucky 42001

Maryland

1. Headquarters Building
Germantown

Principal Contractor:
Westinghouse Management Systems and Services
c/o U.S. Atomic Energy Commission
Washington, D.C. 20545

2. Rockville Virus Laboratory
5640 Fisher Lane
Rockville

Principal Contractor:
Oak Ridge National Laboratory
5640 Fisher Lane
Rockville, Maryland 20852

Massachusetts

1. Laboratory of Nuclear Science
Middleton

Principal Contractor:
Massachusetts Institute of Technology
77 Massachusetts Avenue
Cambridge, Massachusetts 02139

Missouri

1. Kansas City Plant
Bannister Road & Troost
Kansas City

Principal Contractor:
The Bendix Corporation
P.O. Box 1159
Kansas City, Missouri 64141

2. Weldon Springs Retention Basin and Quarry
Off U.S. Highway 70 west
Weldon Springs

Principal Contractor:
National Lead Company of Ohio
P.O. Box 39158
Cincinnati, Ohio 45329

Nevada

1. Nevada Test Site
Mercury

Principal Contractor:
Reynolds Electrical & Engineering Co., Inc.
P.O. Box 14400
Las Vegas, Nevada 89114

2. Tonopah Test Range
47 miles southeast of Tonopah
Tonopah

Principal Contractor:
Sandia Laboratories
P.O. Box 871
Tonopah, Nevada 89049

3. 680 East Sunset Road
6367 Escondido Road
Las Vegas

Principal Contractor:
EG&G, Inc.
P.O. Box 1912
Las Vegas, Nevada 89101

4. 2501 Wyandotte Street
2300 West Rancho Drive, Suite 216
3084 South Highland Drive, Buildings 6, 7, 8
Las Vegas

Principal Contractor:
Reynolds Electrical & Engineering Co., Inc.

P.O. Box 14400
Las Vegas, Nevada 89114

New Jersey

1. Princeton Plasma Physics Laboratory
"C" Site on the Forrestal Campus
Princeton

Principal Contractor:
Princeton University
P.O. Box 682
Princeton, New Jersey 08540

New Mexico

1. a. Sandia Laboratories
Kirtland Air Force Base -- East (KAFB)
Albuquerque

b. 2511 San Mateo, N.E.
Albuquerque

Principal Contractor:
Sandia Laboratories
P.O. Box 5800
Albuquerque, New Mexico 87115

2. Inhalation Toxicology Research Institute
KAFB -- East, Albuquerque

Principal Contractor:
Lovelace Foundation
Building 9200, Area Y
KAFB – East
Albuquerque, New Mexico 87115

3. EG&G Operations
KAFB -- West, NC-135 Area, Albuquerque

Principal Contractor:
EG&G Inc.

c/o NVOO Site Manager
KAFB
P.O. Box 4339
Albuquerque, New Mexico 87106

4. Los Alamos Scientific Laboratory
Los Alamos

Principal Contractor:
University of California
P.O. Box 1663
Los Alamos, New Mexico 87544

5. 1100 4th Street
Los Alamos

Principal Contractor:
EG&G Inc.
P.O. Box 809
Los Alamos, New Mexico 87544

6. 901 Trinity Drive
Los Alamos

Principal Contractor:
The ZIA Company
901 Trinity Drive
Los Alamos, New Mexico 87544

New York

1. Brookhaven National Laboratory
Off William Floyd Parkway
Upton

Principal Contractor:
Associated Universities, Inc.
Upton, New York 11973

2. Knolls Atomic Power Laboratory
River Road
Niskayuna

Principal Contractor:
General Electric Company
P.O. Box 1072
Schenectady, New York 12301

3. Knolls Atomic Power Laboratory
Kesselring Site
West Milton

Principal Contractor:
General Electric Company
P.O. Box 1072
Schenectady, New York 12301

4. Niagara Falls Boron Plant
Model City

Principal Contractor:
National Lead Company of Ohio
P.O. Box 39158
Cincinnati, Ohio 45329

Ohio

1. Portsmouth Gaseous Diffusion Plant
Off Highway U.S. 23
Piketon

Principal Contractor:
Goodyear Atomic Corporation
P.O. Box 628
Piketon, Ohio 45661

2. Mound Laboratory
Miamisburg

Principal Contractor:
Monsanto Research Corporation
P.O. Box 32
Miamisburg, Ohio 45342

3. Feed Materials Production Center
6 miles north of Cincinnati -- off Highway U.S. 50 bypass west
Fernald

Principal Contractor:
National Lead Company of Ohio
P.O. Box 39158
Cincinnati, Ohio 45239

Pennsylvania

1. Bettis Atomic Power Laboratory
West Mifflin

Principal Contractor:
Westinghouse Electric Corporation
P.O. Box 79
West Mifflin, Pennsylvania 15122

2. Shippingport Nuclear Power Station
Shippingport

Principal Contractor:
Duquesne Light Company
P.O. Box 57
Shippingport, Pennsylvania 15077

South Carolina

1. Savannah River Plant
18 miles south of Aiken on State Route 125
Aiken

Principal Contractor:
E. I. du Pont De Nemours and Company
Aiken, South Carolina 29801

Tennessee

1. Oak Ridge National Laboratory
Bethel Valley Road, about 12 miles from Oak Ridge
Oak Ridge

Principal Contractor:
Union Carbide Corporation
P.O. Box X
Oak Ridge, Tennessee 37830

2. Y-12 Plant
Bear Creek Road, about 1.5 miles from Oak Ridge
Oak Ridge

Principal Contractor:
Union Carbide Corporation
P.O. Box Y
Oak Ridge, Tennessee 37830

3. Oak Ridge Gaseous Diffusion Plant
Oak Ridge Turnpike, about 8 miles from Oak Ridge
Oak Ridge

Principal Contractor:
Union Carbide Corporation
P.O. Box P
Oak Ridge, Tennessee 37830

4. Comparative Animal Research Laboratory
1299 Bethel Valley Road
Oak Ridge

Principal Contractor:
University of Tennessee
P.O. Box 1071
Knoxville, Tennessee 37901

5. Tulane Avenue -- New Museum
Tyrone Road -- Wing D -- Hospital (Cancer Research)
Jefferson Road -- Old Museum

South Illinois -- Teacher Training Building
Warehouse Road -- Training Facility
Oak Ridge

Principal Contractor:
Oak Ridge Associated Universities
P.O. Box 117
Oak Ridge, Tennessee 37830

6. Warehouse Road
Oak Ridge

Principal Contractor:
The Rust Engineering Company
P.O. Box 587
Oak Ridge, Tennessee 37830

7. 800 Oak Ridge Turnpike
Oak Ridge

Principal Contractor:
Union Carbide Corporation
P.O. Box Y
Oak Ridge, Tennessee 37830

Texas

1. Pantex Plant
21 miles northeast of Amarillo, 2 miles north of U.S. Highway 60
Amarillo

Principal Contractor:
Mason & Hanger -- Silas Mason Co., Inc.
P.O. Box 647
Amarillo, Texas 79177

Washington

1. a. Hanford Project Site
North Stevens Drive

b. Richland Operations Office
Federal Building
725 Jadwine Avenue

c. 700 Area Facilities -- Richland
A. 703 Building -- Knight Street
B. 712 Building -- Northgate Drive
C. 747 Building -- Knight Street
D. 748 Building -- Swift Street
E. Medical-Dental Building -- Swift Street

Principal Contractors:

Atlantic Richfield
Hanford Co.
P.O. Box 250
Richland, Washington 99352

Battelle-Pacific Northwest
Laboratory
P.O. Box 999
Richland, Washington 99352

Hanford Engineering Development Lab.
P.O. Box 1970
Richland, Washington 99352

United Nuclear Industries, Inc.
P.O. Box 490
Richland, Washington 99352

Hanford Environmental Health Foundation
P.O. Box 100
Richland, Washington 99352

2. 801 First Street
Richland

Principal Contractor:
J. A. Jones Construction Company
801 First Street
Richland, Washington 99352

West Virginia

1. Reduction Pilot Plant
Center of International Nickel Complex
Huntington

Principal Contractor:
International Nickel Company
P.O. Box 384
Huntington, West Virginia 25708

Johnstown Island

1. Holmes & Narver Operations
Main Island

Principal Contractor:
Holmes & Narver, Inc.
P.O. Box 9186
Honolulu, Hawaii 96820

Ohio Constitution. Article II. § 35

§ 35 Workmen's compensation.

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all right of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment may be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an in-

jury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employes, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution. (As amended November 6, 1923. To take effect January 1, 1924.)

Ohio Constitution, Article II, § 28

§ 28 Retroactive laws.

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry in effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in in-

struments and proceedings, arising out of their want of conformity with the laws of this state.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

INDUSTRIAL FABRICATORS, INC.,

Plaintiff,

vs C-2-77-119

THE INDUSTRIAL COMMISSION OF OHIO

Defendant.

OPINION AND ORDER

This matter is before the Court on the parties' cross motions for summary judgment.

Plaintiff's employee suffered personal injury when his hand was caught in a power press during the course of his employment. He filed for an received benefits under Ohio's Workmen's Compensation Laws. Thereafter, the employee made a further application for an additional award, claiming that his injury resulted from the plaintiff's failure to comply with a specific safety requirement adopted by the Industrial Commission.[1] He was again successful, obtaining a twenty percent additional award.

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[1] Article II, Section 35 of the Ohio Constitution, which established Ohio's workmen's compensation scheme, provides in pertinent part:

> [The Workmen's Compensation Board] shall have full power and authority to hear and determine whether or not to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the General Assembly or in the form of an order adopted by such board . . . . When it is found, upon hearing, than an injury, disease, or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen percentum of the maximum

Plaintiff now seeks injunctive relief from an additional award, arguing that the Commission Rule upon which the award was based has been preempted by the promulgation of a national consensus standard by the Secretary of Labor pursuant to the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. [The Act].

Pursuant to his authority under the Act, the Secretary of Labor has promulgated safety standards governing the guarding of power presses. 29 C.F.R. § 1910.217-(a)-(g). The Act sets forth those circumstances under which a state may nevertheless regulate the field of occupational safety despite the Secretary's action. Section 667(b) provides:

> Any State which . . . desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational or health issues with respect to which a federal standard has been promulgated . . . shall submit [for approval by the Secretary of Labor] a state plan for the development of such standards and their enforcement.[2]

It is undisputed that Ohio has submitted no plan incorporating the rules of the Industrial Commission for approval by the Secretary of Labor. It is accordingly clear in the mind of this Court that, relying solely upon the provisions of § 667(b), the rule of the Commission upon which the additional award was based would ordinarily be

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> award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards . . . .

This provision became effective on January 1, 1924.

[2] Section 667(a) makes clear that, where the Secretary has promulgated no safety standard, a state may assert jurisdiction over that particular safety or health issue without prior approval by the Secretary of Labor.

preempted and invalid. *See Campbell v. Bussey*, 368 U.S. 297 (1961); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1946).

The defendant Industrial Commission contends, however, that even if the rule would ordinarily be preempted under the Act, its validity is nevertheless preserved by virtue of the provisions of §§ 653(b)(4):

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under and law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment.

The additional compensation award granted to plaintiff's employee finds its authority in the Ohio Constitution, Article II, Section 35.[3] On its face, then, it would appear that the savings clause of 29 U.S.C. § 653 (b)(4) expressly preserves the additional award made to plaintiff's employee—as well as the Commission rule upon which it was based.

Plaintiff, however, argues that, because the additional award is in the nature of a penalty, it cannot be characterized as a true workmen's compensation law. It is the plaintiff's contention that by basing the award upon a safety standard promulgated by the Industrial Commission,

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[3] While various other aspects of this constitutional provision have been incorporated into Ohio's statutory code, the additional award provision today finds its sole basis in the state constitution and has not been incorporated into the Ohio Revised Code.

Ohio is not the only state with such a workmen's compensation scheme. *See, e.g.*, Hoffman v. Department of Industrial Relations, 287 P. 974 (Cal.); 81 Am. Jur. 2d. "Workmen's Compensation" §§ 55, 359.

the Commission is attempting to regulate the field of industrial safety in a manner inconsistent with federal law.

It is immaterial whether or not the State of Ohio chooses to include the award in its workmen's compensation scheme; the award remains an invalid attempt to regulate indirectly an area where direct regulations has been reserved to the federal government. This Court disagrees.

The Act nowhere specifically defines what is meant by "workmen's compensation law" as used in 29 U.S.C. § 653 (b)(4). The legislative history provides perhaps some insight into Congress' intent in its reference to "State workmen's compensation programs, upon which injured or diseased workers, and their families are frequently wholly dependent for the replacement of lost income, proper medical treatment, and rehabilitation." 1970 U.S. Code Congr. and Admin. News 5177, 5200. *See also* 81 Am. Jur. 2d "Workmen's Compensation" §2.

The history of Ohio's additional award provision indicates that it was meant to fully serve the purpose of compensation and also to supplant the employee's common law rights, pursuant to which he was entitled to seek punitive damages for gross or wilfull wrongdoing on the part of his employer. *State ex rel. Engle v. Industrial Commission*, 142 Ohio St. 425 (1944). These two purposes are, of course, the hallmarks of every workmen's compensation scheme.

Unlike true penalties that form a part of the federal regulatory scheme, the additional award authorized under Ohio law goes directly to the injured employee, rather than to a governmental entity. In this respect, then, the award is truly compensatory. *See State ex rel. Bailey v. Krise*, 18 Ohio St.2d 191, 198 (1969). While calculating a portion of the compensation with reference to some standard of culpability on the part of the employer also serves a deterrence factor, this purpose alone undercuts neither the

compensatory nature of the award nor the basic purpose of Ohio's Workmen's compensation law.

Accordingly, this Court concludes that Ohio's additional award provision forms an integral part of this state's workmen's compensation law and is therefore preserved by virtue of § 663(b)(4) of the Occupational Safety and Health Act. The fact that the Commission rule may or may not conflict with the Act and the regulations promulgated thereunder does not require a different conclusion, for § 653(b)(4) clearly contemplates such conflict and, moreover, reflects a Congressional determination that the workmen's compensation scheme would prevail.[4]

In sum, while Ohio's Industrial Commission may be better advised to follow existing OSHA Standards, the plain language of § 653(b)(4) requires the conclusion that the award based upon the Commission rule is not invalid.

WHEREUPON, the Court determines that plaintiff's motion for summary judgment is without merit and it is therefore DENIED. The Court further determines that the defendant's motion for summary judgment is meritorious and it is therefore GRANTED.

The Clerk shall enter final judgment in favor of the defendant.

/s/ Joseph P. Kinneary
United States District Judge

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[4] It is interesting to note, by way of comparison, that an injured employee's common law right of recovery against his employer was typically based upon a finding of fault, a finding that must necessarily have involved measurement of the employer's conduct with reference to some standard, whether articulated or not. Obviously, not every finding of fault would coincide with relevant OSMA standards, yet such causes of action are clearly preserved by § 653(b)(4).

WORKMEN'S COMPENSATION
THE INDUSTRIAL COMMISSION OF OHIO
DEPARTMENT OF INVESTIGATION
COLUMBUS

REPORT OF INVESTIGATION

Claim No. 80-19975	S. S. No.
Case of Esto R. Miller Rt. #1, Box 111-JJ	Employer Goodyear Atomic Corp. P.O. Box 628
Address McDermott, Ohio 45652	Address Piketon, Ohio 45661

To the Industrial Commission of Ohio,

Pursuant to instructions, the above numbered claim has been made the subject of an investigation and the following report relative to same is herewith submitted: Date Dictated _____

Date of this report _____ Dates of investigation _____
Date Transcribed 8/25/81

Investigation covered following matters: To determine whether the injury to the claimant was caused by the employer's violation of a Specific Safety Requirement.

CODE SECTIONS CITED:
Section 4121:1-5-03 Ladders and Scaffolds Section D, Paragraph (2) Page #41 of The Ohio Administrative Code

HISTORY OF THE INJURY:
Investigation reveals that at the time the claimant sustained the injury of record, he was employed as a maintenance mechanic for about six years at the Goodyear Atomic plant, located East of State Route #23 in Piketon, Ohio. That his employment at this plant began on March 3, 1975.

That the claimant was in the process of removing old and discarded piping, hangers, and conduit from building X705. That he was performing these duties while working from a high horse ladder stand. In order to complete his duties

the upper section of the guardrail had to be lowered to ground level in order to pass beneath some conduit lines that were yet to be removed.

That the claimant was attempting to perform a function by himself when procedure called for two men. That he was lowering the side rails down from the high horse ladder stand when a long protruding bolt used as a hinge or pivot pin caught on the cuff of his gloves causing the claimant to lose his balance and he fell approximately six (6) feet to the concrete floor landing on his feet and causing the injury of record to his left foot.

The high horse ladder stand identified by Serial No. 73381 GAT-No-18-03326, manufactured by the M. S. Churchman Company of 6433 E. 30th St., Indianapolis, In.

AFFIDAVITS:
Esto R. Miller, in his Affidavit of August 13, 1981, states as follows:

> "Esto A. Miller, upon his oath, deposes and states that he is of legal age and resides at Rt. #1, Box 111-JJ in McDermott, Ohio 45652. That he is the claimant in the above styled claim.
>
> Further states that he has been employed by the instant employer for about six years. That he was working in the capacity of maintenance mechanic at the Goodyear Atomic plant located in Piketon, Ohio, at the time he sustained his injury of record on the 30th day of July, 1980, the date of the injury in the instant claim.
>
> States that he was in the process of removing old piping hangers and conduit from Building X705. That in order to complete the operation, the upper guardrail had to be lowered to ground level. That the upper guardrail section is part of what is known as a high horse ladder stand. That

the ladder stand was poorly maintained, such as missing bolts and makeshift pivot or hinge pins. That two bolts missing entirely from the opposite side of the guardrail.

That as he attempted to lower the guardrail, a protruding bolt in the guardrail caught his glove and pulled him from the platform. That he fell about six (6) feet to the concrete floor and as a result he suffered his injury of record.

That he cannot identify the prints that are in the possession of this investigator because they have several platforms or ladder stands and they are all identical."

Hoy Howard, in his Affidavit of August 12, 1981, states as follows:

"Hoy Howard, upon his oath, deposes and states that he is of legal age and resides at 97 Stricklind, Piketon, Ohio 45661.

Further states that he has been employed by the instant employer for about 7 1/2 years. That he was working in the capacity of welder at the time the claimant sustained the injury of record on the 30th day of July, 1980, the date of the injury in the instant claim. That he was an eyewitness to the incurring of the injury and is familiar with the incident.

Further states that the claimant was in the process of lowering the handrails on the high horse ladder stand to get the ladder stand under some electrical conduit in order to complete the work assignment.

States that the claimant was attempting to lower the side rails or guardrails. As the guardrailing swung forward, a protruding bolt that was used

as a hinge pin caught the cuff of his glove and pulled the claimant off of the platform and he fell approximately six and one half feet (6 1/2) to the concrete floor and as a result he suffered his injury of record.

The affiant states that polaroid prints in the possession of this investigator showing the high horse ladder stand appears to be the platform involved in the accident, however, their is one other ladder stand in the Building X705 and it is identical as a matter of fact, it is shown in one print of the Exhibits. States that he is fairly sure that only two exist in the building."

John Greene, in his Affidavit of August 13, 1981, states as follows:

"John Greene, upon his oath, deposes and states that he is of legal age and resides at 4020 Grandview Drive in Ashland, Ky. 41101.

Further states that he has employed by the instant employer for about six (6) years. That he was working in the capacity of welder at the time the claimant sustained the injury of record on the 30th day of July, 1980, the date of the injury in the instant claim. That he was an eyewitness to the incurring of the injury and is familiar with the incident.

States that the claimant was removing old pipe from Building X705. That he was working from high horse ladder stand in order to complete the operation the upper guardrails had to be lowered to ground level in order to clear some electrical conduit that was too low to permit passage of the platform.

That the claimant was in the process of lowering the guardrails section; a bolt that was protruding

from the pivot or hinge point caught the cuff of his glove and pulled him from the platform and he fell approximately six (6) feet to the concrete floor and as a result suffered his injury of record. States that several bolts were missing from the opposite side of the platform.

States that the polaroid prints that are in the possession of this investigator cannot be identified by him as the platform involved in the accident; that several of the platforms are used and they are identical."

B. R. Rider, in his Affidavit of August 12, 1981, states as follows:

"B. R. Rider, upon his oath, deposes and states that he is of legal age and resides at 205 Forsythe Street in Piketon, Ohio 45661.

Further states that he has been employed by the instant employer for about seven years. That he was working in the capacity of maintenance mechanic at the time the claimant sustained the injury of record on the 30th day of July, 1980, the date of the injury in the instant claim. That he was an eyewitness to the incurring of the injury and is familiar with the incident.

Further states that the claimant attempting to lower the guardrails on the high horse platform to ground level in order to complete the operation of removing old piping from the building.

States that when the claimant was trying to lower it at the hinge or pivot point, a long protruding bolt that was not part of the original equipment (and that several bolts were missing from the guardrails) but was used as a makeshift pivot point caught the cuff of his glove and pulled him from the platform. That he fell about six (6) feet

to the concrete floor, and as a result suffered his injury of record.

The affiant states that the polaroid prints are a true picture of the high horse platform but is not sure if it was the one involved in the accident. That many platform ladders are used and they are all identical."

EXHIBITS:

1. Two (2) Polaroid prints courtesy of Goodyear Atomic that only reveals a view of the high horse ladder stand.
2. A copy of the employer's internal accident investigation report.

DISCUSSION:

This investigator was not permitted to take any polaroid prints as no cameras are allowed into the plant itself. The prints made available to me by Goodyear Atomic were not positively identified as the high horse ladder stand involved in the accident (see all C-105-R's).

A recommendation has been made to strengthen procedures and all of the bolts on the ladder stands have been tightened and/or replaced. Purchase date on ladder stand is April, 1976 from computer.

Respectfully submitted,

/s/James G. Johnson
Special Investigator

JCJ/get

APPELLANT'S BRIEF

Supreme Court, U.S.
FILED
SEP 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

(6)

No. 86-1172

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GOODYEAR ATOMIC CORPORATION,
Appellant,

v.

STATE EX REL. ESTO MILLER,
Appellee.

On Appeal From The Supreme Court Of Ohio

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

A. Whether nuclear production and utilization facilities owned, controlled, and regulated by the United States pursuant to the Atomic Energy Act of 1954, as amended, are exempt from state occupational safety and health regulation under the Supremacy Clause of the United States Constitution.

B. Whether the Atomic Energy Act of 1954, as amended, and the regulations promulgated thereunder, preempt the State of Ohio from imposing state occupational safety and health regulations upon the operation of a nuclear production and utilization facility owned and regulated by the United States.

LIST OF PARTIES

The parties to the proceedings below were the Goodyear Atomic Corporation, appellant herein, Esto R. Miller, the Industrial Commission of Ohio, and the Administrator of the Ohio Bureau of Workers' Compensation.

Appellant is a wholly owned subsidiary of the Goodyear Tire and Rubber Company.* It has no subsidiaries that are not wholly owned. Appellant's affiliated entities are listed below.**

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* The other subsidiaries of Goodyear Tire and Rubber Company are:
Brad Ragan, Inc.
Cambridge Tire Co. of Braintree, Inc.
Celercor Investments
Celeron Corporation
Celeron Pipeline Company
Cosmoflex, Inc.
D.C.H., Inc.
Goodyear Blimp Europa, Inc.
Goodyear Corporation
Goodyear Farms, Inc.
Goodyear Financial Corporation
Goodyear Footwear Corporation
Goodyear Golf & Country Club, Inc.
Goodyear International Corporation
Goodyear International Export Corporation
Goodyear International Finance Corporation
Goodyear Nuclear Investment Company
Goodyear Properties
Goodyear Rubber Insulating Company
Goodyear Rubber Plantations Company
Goodyear Tire & Rubber Company Fund
Goodyear Ventures
Goodyear Western Hemisphere Corporation
Hose Couplings Manufacturing, Inc.
Kelly-Springfield Tire Company, The
Lee Tire & Rubber Company

Litchfield Park Properties, Inc.
Long Mile Rubber Company of Pennsylvania
MIN Tire Equipment Inc.
Tire Equipment Inc.
Motor Wheel Corporation
Retread Systems Inc.
Reneer Films Corporation
Rubber City Capital Corporation
Western States Tires and Auto Service, Inc.
WFT Inc.
Wingfoot Corporation
Wingfoot Films Corporation
Goodyear Canada, Inc.
Goodyear de Chile S.A.I.C.
Goodyear de Colombia S.A.
Kelly-Springfield Tyre Co. Ltd.
Goodyear Industrial Rubber Products Limited
Compagnia Francaise Goodyear
Deutsche Goodyear Gesellschaft mit beschraenkter Haftung
Goodyear Hellas S.A.I.C.
Plantaciones de Hule Goodyear, Sociedad Anonima
Gran Industria De Neumaticos Centroamericana S.A.
Goodyear India Limited
Plantations Company Ltd.
Good Belt Iran
Goodyear Italiana S.p.A.
Servicar S.p.A.
Goodyear Jamaica Limited
Nippon Goodyear Kabushiki Kaisha
Toyobo Petcord Co., Ltd.
Goodyear, S.A.
Goodyear Malaysia Berhad
Compania Hulera Goodyear-Oxo, S.A.
Goodyear Tire & Rubber Company of Mexico, S.A., The
Goodyear Maroc
Goodyear Overseas Finance, N.V.
Goodyear (Nederland) B.V.

Goodyear New Zealand Limited
Goodyear Bendel Rubber Processing Company (Nigeria) Limited
Goodyear de Panama, S.A.
Goodyear Export, S.A.
Compania Goodyear del Peru S.A.
Philippine Rubber Project Company Inc.
Goodyear Portuguesa, Lda
Goodyear Orient Company (Private) Limited
Goodyear Singapore Private Limited
Goodyear Tyre & Rubber Company (S.A.)(Proprietary) Limited, The
Kelly-Springfield Tyre Co. S.A. (Pty) Limited
Compania Espanola de Neumaticos Y Caucho Goodyear (SA)
Svenska Goodyear Aktiebolag
Kelly-Springfield Gummi Aktiebolag
Goodyear (Suisse) S.A.
Goodyear Taiwan Limited
Goodyear (Thailand) Limited
Goodyear Lastikleri Turk Anonim
Goodyear Zaire S.A.R.L.
Goodyear Zimbabwe (Private) Ltd.
Wingfoot Finance Company Limited
Granford Manufacturing, Inc.
Nippon Giant Tire Co., Ltd.
Goodyear Export Sales Corporation

** Subsequent to the initiation of this action, appellant's contract with the United States Department of Energy was assumed by Martin-Marietta Energy Systems, Inc. (Martin-Marietta). Martin-Marietta's affiliates are listed below:

Aminsa (Aditinosy Minerales S.A.)
Atlantic Granite Co.
BOCEP Properties
BOCEP Venturers
Concrete Supply Company
EO Systems Holdings Corporation
  EO Systems International Ltd.
Export Products Foreign Sales Corp.
Fry Sales and Equipment Co.
Gamma Monolithics, Inc.
International Light Metals Corporation

International Light Metals Sales Corporation
MDTT, Inc.
ML Holding Corp.
  Molecular Genetics
  Native Plants, Inc.
Malcom Stone Company
Manley Sand Corporation
Marietta Facilities, Inc.
Marietta Resources International Ltd.
Martek Corporation
Martin Company, The
Martin Marietta Aluminum Properties, Inc.
  Martin Marietta Carbon Inc.
Martin Marietta Canada Ltd.
Martin Marietta Communications Systems, Inc.
  Hoskyns Group Limited
  Hoskyns Limited
  Hoskyns Data Centres Limited
  Hoskyns Group (NZ) Ltd.
  John Hoskyns & Company Limited
  Hoskyns Systems Centre Limited
  Hoskyns Systems Development Limited
  Hoskyns Systems (Far East) Limited
  Hoskyns Systems Limited
  Hoskyns Systems Research Limited
Martin Marietta, Ltd.
Martin Marietta International, Inc.
Martin Marietta Investments Inc.
  Chesapeake Park, Inc.
  Equatorial Communications Co.
  Martin Orlando East Properties, Inc.
  Martin Orlando Properties, Inc.
  Orlando Central Park, Inc.
  Verdix Corporation
Martin Marietta Measurements Systems, Inc.
Martin Marietta Ordinance Systems, Inc.
Martin Marietta Overseas Corporation
Martin Metals Company
Martin Marietta Information Technology, Inc.
  Intelligent Systems Co., Inc.
  Mathematics International, Inc.

Worldwide Software Associates, Inc.
Maxim Group Incorporated
Maxima Corporation
Microelectronics & Computer Technology Corp.
PGM Systems, Limited
R & T Trucks Inc.
Rockton & Rion Railway
SARCA (Suramericana De Refractorios C.A.)
Software Production Consortium
Standard Lime and Cement Company
Standard Magnesia Limited
Superior Stone Company
Tennessee Innovation Center, Inc.
Torrance Advanced Metals Corporation
Weaver Construction Company

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	ix
BRIEF OF APPELLANT ON THE MERITS	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	9
ARGUMENT	10
A. Ohio's System of Providing Additional Awards for Violation of Specific Safety Requirements Constitutes State "Regulation"	10
B. The Federally Owned Portsmouth Plant Is Constitutionally Exempt From the Attempted State Regulation Under the Supremacy Clause	19
1. The Attempted State Regulation Is Barred By the Doctrine of Federal Facility Immunity	19
2. The Attempted State Regulation Impermissibly Impairs Performance of Federal Policies	30
C. The Atomic Energy Act Preempts State Occupational Health and Safety Regulation of Federally Owned Nuclear Production Facilities	33
1. Through the Atomic Energy Act, Congress Intended to Preempt State Regulation of Occupational Health and Safety at Federally Owned Nuclear Production and Utilization Facilities	35

2. The Ohio Scheme Cannot Be Applied to the Portsmouth Plant Because It Stands As An Obstacle to Accomplishment of the Full Purposes and Objectives of Congress 44

CONCLUSION 48

TABLE OF AUTHORITIES

CASES: Page

Alabama v. King & Boozer, 314 U.S. 1 (1941) ... 23

Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983) 47

California ex rel. State Water Resources Control Board v. EPA, 511 F.2d 963 (9th Cir. 1975), *rev'd on other grounds*, 426 U.S. 200 (1976) 21

California Federal Savings and Loan Association v. Guerra, ___ U.S. ___, 107 S. Ct. 683 (1987) 34

California Public Utilities Commission v. United States, 355 U.S. 534 (1958) 30

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 43

Chemical Manufacturers Association v. National Resources Defense Council, Inc., 470 U.S. 116 (1985) 41

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 41

Cohen v. California, 403 U.S. 15 (1971) 2

County of Suffolk v. Long Island Lighting Co., 728 F.2d 52 (2d Cir. 1984) 40

Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp., 642 F.2d 527 (D.C. Cir. 1980) 22

Duke Power Co. v. Carolina Environmental Study Group, Inc. 438 U.S. 59 (1978) 36

Environmental Protection Agency v. California ex rel. State Water Resources Control Board, 426 U.S. 200 (1976) 21

Fidelity Federal Savings & Loan Association v. De la Cuesta, 458 U.S. 141 (1982) 33,34,41,43

Table of Authorities Continued

Page

Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1968) 35

Fort Halifax Packing Co., Inc. v. Coyne, ___ U.S. ___, 107 S. Ct. 2211 (1987) 47

Haig v. Agee, 453 U.S. 280 (1981) 32

Hancock v. Train, 426 U.S. 167 (1976) 20,21,22,23,25

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) 34,35,45

Hines v. Davidowitz, 312 U.S. 52 (1941) 35,45,47,48

International Paper Co. v. Ouellette, ___ U.S. ___, 107 S. Ct. 805 (1987) 14,15,25,34,35,36,39,40,45,46,47

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 2

Johnson v. Maryland, 254 U.S. 51 (1920) 19,20,31

Jones v. Rath Packing Co., 430 U.S. 519 (1977) .. 33,47

Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954) 21

Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956) 30,33

Louisiana Public Service Commission v. Federal Communications Commission, ___ U.S. ___, 106 S. Ct. 1890 (1986) 44

Mayo v. United States, 319 U.S. 441 (1943) 20,21

McCulloch v. Maryland, 4 Wheat. 316 (1819) 19

Meese v. Keene, ___ U.S.___, 107 S. Ct. 1862 (1987) 33

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 2

Michigan Canners & Freezers Association v. Agricultural Marketing and Bargaining Board, 467 U.S. 461 (1984) 47

Murray v. Gerrick & Co., 291 U.S. 315 (1934) .. 26,28

Table of Authorities Continued

Page

Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972) 41

Ohio v. Thomas, 173 U.S. 276 (1899) 20,23

Osborn v. Bank of the United States, 9 Wheat. 738 (1820) 20

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983) 24,25,34,36,37,39

Paul v. United States, 371 U.S. 245 (1963) 21,30

Penn Dairies, Inc. v. Pennsylvania Milk Control Commission, 318 U.S. 261 (1943) 23

Perez v. Campbell, 402 U.S. 637 (1971) 14

R.J. Reynolds Tobacco Co. v. Durham County, North Carolina, ___ U.S. ___, 107 S. Ct. 499 (1986) 2,34,43

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 35

Regan v. Wald, 468 U.S. 222 (1984) 33

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 34,40,41

Rose v. Arkansas State Police, ___ U.S. ___, 107 S. Ct. 334 (1986) 35

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 14,46

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 10,16,33,36,44

State ex rel. Bailey v. Krise, 18 Ohio St. 2d 191, 249 N.E.2d 55 (1969) 13

State ex rel. Emmich v. Industrial Commission, 148 Ohio St. 658, 76 N.E.2d 710 (1947) 13

State ex rel. Hill v. Industrial Commission, 172 Ohio St. 115, 173 N.E.2d 890 (1961) 17

Table of Authorities Continued

	Page
State ex rel. Holdosh v. Industrial Commission, 149 Ohio St. 179, 78 N.E.2d 165 (1948)	18
State ex rel. Kroger Co. v. Industrial Commision, 62 Ohio St. 2d 4, 402 N.E.2d 528 (1980)	13
State ex rel. Miller Plumbing Co. v. Industrial Commission, 149 Ohio St. 493, 79 N.E.2d 553 (1948)	17
State ex rel. Rae v. Industrial Commission, 136 Ohio St. 168, 24 N.E.2d 594 (1939)	17
State ex rel. Rudd v. Industrial Commission, 116 Ohio St. 67, 156 N.E. 107 (1927)	12
State ex rel. Whitman v. Industrial Commission, 131 Ohio St. 375, 3 N.E.2d 52 (1936)	13,14
United States v. Georgia Public Services Commission, 371 U.S. 285 (1963)	30,33
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S. Ct. 455 (1985)	41
United States v. United Mine Workers, 330 U.S. 258 (1947)	21
United States v. United States District Court, 407 U.S. 297 (1972)	33
United States v. Wittek, 337 U.S. 346 (1949)	21
Xerox Corp. v. County of Harris, Texas, 459 U.S. 145 (1982)	2
CONSTITUTIONAL PROVISIONS:	
U.S. Const. Art. I, § 8, cl. 17	19,27
U.S. Const. Art. VI, para. 2	2,19
Ohio Const. Art. II, § 35	2,8,11,12,18

Table of Authorities Continued

	Page
STATUTES:	
28 U.S.C. § 1257(2)	2
29 U.S.C. § 653(b)(1)	7,42
40 U.S.C. § 290	17,25,28,29
42 U.S.C. § 2014	5,32,36,37,41,48
42 U.S.C. § 2021	17,24,25,37,39
42 U.S.C. § 2061	3,4,6,7,17,22,23,38,42,45,48
42 U.S.C. § 2071	36
42 U.S.C. § 2072	36
42 U.S.C. § 2073	5,36
42 U.S.C. § 2074	5,36
42 U.S.C. § 2075	36
42 U.S.C. § 2076	36
42 U.S.C. § 2077	36
42 U.S.C. § 2078	36
42 U.S.C. § 2091	36
42 U.S.C. § 2092	36
42 U.S.C. § 2093	5,36
42 U.S.C. § 2094	5,36
42 U.S.C. § 2095	36
42 U.S.C. § 2096	36
42 U.S.C. § 2097	36
42 U.S.C. § 2098	36
42 U.S.C. § 2099	36
42 U.S.C. § 2111	5,36
42 U.S.C. § 2112	5,36
42 U.S.C. § 2113	36
42 U.S.C. § 2114	36
42 U.S.C. § 2131	5

Table of Authorities Continued

	Page
42 U.S.C. § 2133	5
42 U.S.C. § 2161	47
42 U.S.C. § 2162	47
42 U.S.C. § 2163	47
42 U.S.C. § 2164	47
42 U.S.C. § 2165	47
42 U.S.C. § 2166	47
42 U.S.C. § 2167	47
42 U.S.C. § 2168	47
42 U.S.C. § 2201	3,6,37,38,42,48
Ohio Rev. Code § 4121.13	12
Ohio Rev. Code § 4121.131	31
Ohio Rev. Code § 4121.14	31
Ohio Rev. Code § 4121.15	31
Ohio Rev. Code § 4121.16	31
Ohio Rev. Code § 4121.17	31
Ohio Rev. Code § 4121.47	4,32
OTHER MATERIALS:	
80 Cong. Rec. 9180-9181, 9643 (1936)	27,29
DOE Order 5481	7
DOE Order 5482	7
DOE Order 5483	7
DOE Order 5483.1A	7,42
H.R. Rep. No. 2181, 83d Cong., 2d Sess. (1954)	36
H.R. Rep. No. 2656, 74th Cong., 2d Sess. (1936)	26,27,21
A. Larson, *The Law of Workmen's Compensation* (1982)	27,28

Table of Authorities Continued

	Page
Ohio Admin. Code § 4121-3-20(K)(3)	32
Ohio Admin. Code ch. 4121:1-5	8,16
S. Rep. No. 870, 86th Cong., 1st Sess. (1959)	25,39,40
S. Rep. No. 980, 93d Cong., 2d Sess. (1974)	37
S. Rep. No. 2294, 74th Cong., 2d Sess. (1936)	17,26,27,28,29
J. Young, *Workmen's Compensation Law of Ohio* (2d ed. 1971)	12

BRIEF OF APPELLANT ON THE MERITS

Appellant, Goodyear Atomic Corporation, appeals from a judgment of the Supreme Court of Ohio holding that the Supremacy Clause of the Constitution and the Atomic Energy Act of 1954, as amended, do not preclude the Industrial Commission of Ohio from applying Ohio's system of additional awards for violation of specific safety requirements to a federal nuclear facility owned, regulated and controlled by the United States through its Department of Energy and managed under contract by appellant.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, which is reprinted at Joint Appendix (J.A.) 4, is reported at 26 Ohio St. 3d 110, 497 N.E.2d 76 (1986). The opinion of the Franklin County Court of Appeals, dated July 25, 1985, was not reported and is reprinted at J.A.-12. The order and finding of the Industrial Commission of Ohio, dated March 8, 1983, and the Commission's denial of a motion for rehearing, were not reported and are reprinted at J.A.-18 and J.A.-21, respectively.

JURISDICTION

The final judgment of the Supreme Court of Ohio, affirming the Franklin County Court of Appeals' issuance of a writ of mandamus to the Industrial Commission of Ohio, was entered on August 20, 1986. Notices of appeal to this Court were timely filed in the Supreme Court of Ohio, and in the Franklin County Court of Appeals, which possesses the record in this case, on October 27, 1986.

The appeal was docketed in this Court on January 17, 1987, within one hundred and fifty (150) days of the entry of final judgment by the Supreme Court of Ohio, a motion for extension of time being granted by this Court on November 10, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).[1] This Court noted probable jurisdiction on June 22, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, paragraph two, United States Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article II, Section 35 of the Ohio Constitution:

Such board shall have full power and authority to hear and determine whether or not an injury, disease

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[1] That it was arguably the "application" of state requirements to federal facilities, rather than the "validity" of the state regulatory scheme, which was specifically called into question in this case, does not alter the right to an appeal under 28 U.S.C. § 1257(2). As this Court noted in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 441 (1979), "a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." *See also R.J. Reynolds Tobacco Co. v. Durham County, North Carolina*, ___ U.S. ___, 107 S. Ct. 499 (1986); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985); *Xerox Corp. v. County of Harris, Texas*, 459 U.S. 145 (1982); *Cohen v. California*, 403 U.S. 15 (1971).

or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the General Assembly or in the form of an order adopted by such board, and its decision shall be final.

United States Code Title 42, Section 2061:

(a) The Commission, as agent of and on behalf of the United States shall be the exclusive owner of all production facilities . . . .

(b) To the extent deemed necessary the Commission is authorized to make contracts with persons obligating them to produce special nuclear material in facilities owned by the Commission. Any contract entered into under this Section shall contain provisions . . . obligating the contractor to comply with all safety and security regulations which may be prescribed by the Commission.

United States Code Title 42, Section 2201:

In the performance of its functions the Commission is authorized to--

(e) acquire such material, property, equipment, and facilities, establish or construct such buildings and facilities, and modify such buildings and facilities from time to time, as it may deem necessary . . .

* * *

(i) prescribe such regulations or orders as it may deem necessary . . . (3) to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such

activity, in order to protect health and to minimize danger to life or property; . . . .

Ohio Revised Code, Section 4121.47:

(A) No employer shall violate a specific safety rule of the Industrial Commission or act of the General Assembly adopted pursuant to Section 4121.13 or 4121.131 of the Revised Code.

(B) Where the Commission, in the course of its determination of a claim for an additional award under Section 35 of Article II, Ohio Constitution, finds the employer guilty of violating Division (A) of this Section, it shall, in addition to any award paid to the claimant, issue an order to correct the violation within such period of time as the Commission fixes. For any violation occurring within twenty-four months of the last violation, the Commission shall assess against the employer a civil penalty in an amount the Commission determines up to a maximum of fifty thousand dollars for each violation. In fixing the exact penalty, the Commission shall base its decision upon the size of the employer as measured by the number of employees, assets, and earnings of the employer.

STATEMENT OF THE CASE

Under provisions of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.* (the "Act"), the United States Department of Energy ("DOE") is charged with exclusive responsibility for ownership and operation of all nuclear production facilities located in the United States. *See* 42 U.S.C. § 2061.[2]

[2] The Act defines "production facility" to mean "(1) any equipment or device determined by rule of the [DOE] to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the [DOE]." 42 U.S.C. § 2014(v). "Special nuclear material," in turn, is defined as "(1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material." *Id.* § 2014(aa).

One of those facilities is the Portsmouth Gaseous Diffusion Plant located near Piketon, Ohio ("Portsmouth plant"). J.A.-100. That plant enriches and refines fuel materials to assays which can be used for civilian energy and national defense purposes and is the only currently operating facility in the United States capable of enriching uranium to the assay which is required by the United States Navy to power its nuclear ships and submarines and for nuclear weapons. Information relating to the design and technology utilized at the facility is highly classified and access to the facility is severely restricted.

The federal statutory scheme providing for exclusive DOE ownership and control of nuclear production facilities is wholly separate and distinct from the authority granted the Nuclear Regulatory Commission ("NRC") to supervise the operation of nuclear power plants. *See* 42 U.S.C. §§ 2131, 2133; *see also* 42 U.S.C. §§ 2073, 2074, 2093, 2094, 2111, 2112. Such plants, of which there are more than one hundred nationwide, are neither owned nor operated by DOE, but rather by private and public utilities licensed by the NRC. For the most part, the NRC is concerned only with

radiological safety at those power plants, while non-nuclear safety concerns are regulated primarily by state entities. This regulatory scheme differs dramatically, however, from the manner by which DOE-owned facilities such as the Portsmouth plant are required to be regulated.

The Atomic Energy Act mandates that DOE own and be responsible for the operation of all nuclear production facilities. *See* 42 U.S.C. § 2061(a). It does authorize DOE to contract with private entities for management of the production of special nuclear materials at those facilities, *see id.* § 2061(b), but does not permit the abdication of DOE's exclusive responsibility for the regulation of such facilities and specifically requires that any management contract "shall contain provisions . . . obligating the contractor to comply with all safety and security regulations . . . ." *Id.* All contractors are subject to the direction and control of DOE. *See id.* DOE also is authorized to promulgate "standards and instructions to govern the possession and use" of radiological materials at the facilities, *see* 42 U.S.C. § 2201(b), and to require contractor compliance with whatever safety and security regulations it may prescribe. *See id.* § 2061(b)(2)(c). Furthermore, DOE is empowered to "prescribe such regulations or orders as it may deem necessary . . . to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property." 42 U.S.C. § 2201(i)(3).

In accordance with their statutory mandate, DOE and its predecessor agencies have promulgated ex-

tensive radiological and non-radiological health and safety standards applicable to its production facilities.[3] Likewise, DOE's management contracts for those production facilities specifically require compliance with such federally developed safety standards. *See* 42 U.S.C. § 2061(b)(2)(C).[4]

Appellant manages the Portsmouth plant pursuant to such a contract with DOE. That contract contains a clause typical of provisions which govern DOE's nuclear production facilities nationwide, providing:

> The corporation shall take all reasonable precautions in the performance of the work under this contract to protect the safety and health of employees and of members of the

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[3] *See* DOE Order 5481, *Safety Analysis and Review*; DOE Order 5482, *Environmental Protection, Safety & Health Protection Appraisal Program*; DOE Order 5483, *Occupational Safety & Health Program for DOE-Contractor Employees at Government Owned Contractor Operated Facilities*. The DOE's regulation of occupational health and safety at the Portsmouth plant has been remarkably successful. For the years 1980 to 1985, there were no employee deaths at the Portsmouth plant and the average injury rate was approximately 1.1 for every 100 employees. In contrast, figures prepared by the Industrial Commission of Ohio reveal that, for the years 1980 to 1985, the average worker fatality rate at Ohio companies was 5.7 per 100,000 employees, and the average injury and illness rate was approximately 2.6 for every 100 workers.

[4] DOE's non-radiological health and safety standards generally adopt Occupational Safety and Health Administration (OSHA) standards. *See* DOE Order 5483.1A, at I-1. Because DOE's government-owned, contractor-operated facilities are not covered by the OSHA statute, *see* 29 U.S.C. § 653(b)(1), J.A.-78-87, OSHA standards apply to such facilities only if and to the extent they are specifically adopted by DOE.

> public and shall comply with all applicable safety and health regulations and requirements [including reporting requirements] of DOE . . . . In the event that the corporation fails to comply with said regulations or requirements of DOE, the contracting officer may, without prejudice to any other legal or contractual rights of DOE, issue an order stopping all or any part of the work; . . . .

Article XX, Contract No. DE AC05 760R00001.

On or about July 30, 1980, appellee Esto R. Miller, an employee of the appellant, was injured at the Portsmouth plant when he fell from a federally owned mobile scaffolding and fractured his left ankle. J.A.-4; J.A.-40-41. Miller's injury allegedly was caused when his glove caught on a bolt protruding from the guardrail of the scaffolding and he was pulled from the scaffolding to a concrete floor below. J.A.-4; J.A.-41. Miller received approximately $9,000 in benefits under the Ohio Worker's Compensation Law. After returning to work, Miller applied to the Industrial Commission of Ohio for an additional award on the ground that the Portsmouth plant failed to comply with an Ohio specific safety requirement.[5] Article II, Section 35 of the Ohio Constitution provides for such an award when a claimant's injury results from an

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[5] Miller's application asserted violation of Ohio Admin. Code § 4121:1-5-03(D)(2), which provides that, with respect to manually propelled mobile work platforms and rolling scaffolds, "[e]xposed surfaces shall be free from sharp edges, burrs or other projecting parts." This provision is one of a number of standards applicable to all Ohio workshops and factories. *See* Ohio Admin. Code ch. 4121:1-5.

employer's failure to comply with a specific safety requirement promulgated by the Commission.

The Commission rejected Miller's application on the basis of federal preemption. J.A.-18. Thereafter, Miller instituted an action in mandamus in the Franklin County Court of Appeals. That Court rejected appellant's constitutional arguments and issued a writ of mandamus requiring the Commission to take jurisdiction over Miller's application. J.A.-12. In the decision appealed from herein, the Ohio Supreme Court also upheld the Ohio regulation against the federal constitutional challenge. J.A.-4.

The decision of the Ohio Supreme Court represents the first time in the documented history of operation of DOE-owned facilities that imposition of state-promulgated occupational health and safety standards has been attempted. The United States, through DOE and its predecessors, has traditionally exercised exclusive jurisdiction over occupational health and safety at those facilities and, prior to the decision appealed herein, no State has ever challenged such federal authority in formal proceedings.

SUMMARY OF ARGUMENT

This case involves compelling questions of Supremacy Clause analysis that may have a far-reaching effect upon federal and state government relations under the Constitution. The decision of the Ohio Supreme Court sanctions state regulation of a federally owned and controlled facility, even though Congress has not specifically consented to such regulation as the Supremacy Clause requires. In addition, the federal facility in question is engaged in producing nuclear materials that are critical to the national se-

curity of the United States. If affirmed, the Ohio Supreme Court's decision would permit substantial state interference with the performance of important federal functions at a federal facility.

Furthermore, the decision below expressly fails to recognize the preemptive effect of the Atomic Energy Act, and regulations promulgated thereunder, with respect to state regulation of federally owned nuclear production and utilization facilities. Instead, the Ohio Supreme Court confuses such facilities with privately owned, federally licensed nuclear power plants and thus, as a matter of law, predicates its holding upon an erroneous premise.

ARGUMENT

A. Ohio's System of Providing Additional Awards for Violation of Specific Safety Requirements Constitutes State "Regulation"

Prior to reaching the substance of the questions presented by this case, it is necessary to first dispose of the threshold argument posed by appellee Esto Miller--that Ohio's system of providing additional awards for violation of specific safety requirements does not constitute state "regulation" for purposes of Supremacy Clause analysis. *See* Motion to Dismiss or Affirm of Esto Miller, at 5-9. Appellee asserts that the additional awards process is compensatory in nature and follows traditional principles of tort law in assessing damages. *Id.* In this respect, appellee contends, the Ohio additional awards system is analogous to the punitive damage awards upheld against a preemption challenge in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). This Court need not tarry long in dismissing this argument as meritless.

In order to properly assess appellee's position, it is necessary to examine the framework governing additional awards for violation of specific safety requirements established by Article II, Section 35 of the Ohio Constitution. That constitutional provision begins by recognizing the Ohio General Assembly's authority to create a worker's compensation fund and a state "board" to administer a worker's compensation program. The provision then continues:

> Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the General Assembly or in the form of an order adopted by such board, and its decisions shall be final . . . . When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease or death, and paid in like manner as other awards; and, if such compensation is paid from the state [worker's compensation] fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount

of such additional award, notwithstanding any and all other provisions in this constitution.

Ohio Const. Art. II, § 35 (Page 1979).

Thus, the Ohio General Assembly and the Industrial Commission of Ohio are empowered to promulgate specific safety requirements governing conditions in Ohio workplaces. Ohio Const. Art. II, § 35; Ohio Rev. Code § 4121.13(B) (Page 1979). If, after a hearing, the Industrial Commission determines that an employee's injury, disease or death is attributable to a violation of a specific safety requirement by his employer, the Commission is obligated to provide the employee with an additional award of between 15 percent and 50 percent of the maximum award permitted by law. Ohio Const. Art. II, § 35. If the employer is self-insured and thus not a participant in the state workers' compensation fund, he pays the additional award directly. *See* J. Young, *Workmen's Compensation Law of Ohio* § 19.12, at 309 (2d ed. 1971). If the employer is a state fund participant, he bears the cost of the additional award through additional payments that allow the state fund to recoup the amount of the additional award. Ohio Const. Art. II, § 35; J. Young, *supra*, § 19.12, at 309; *see also State ex rel. Rudd v. Industrial Commission*, 116 Ohio St. 67, 156 N.E. 107 (1927) (discussing recoupment of additional awards for violation of specific safety requirements).

A review of the scheme for assessing additional awards for violation of specific safety requirements thus reveals that Ohio's system constitutes "regulation." The scheme clearly is intended to penalize employers who fail to comply with mandatory safety requirements promulgated by a state administrative

agency. Indeed, Ohio courts have consistently recognized that the scheme is penal in nature. As the Ohio Supreme Court noted in *State ex rel. Emmich v. Industrial Commission*, 148 Ohio St. 658, 76 N.E.2d 710 (1947):

> The additional award serves another great objective: The state is concerned for the safety of its citizens, and specific requirements with reference tc working conditions are enacted for the purpose of protecting workmen from injury, disease and death. This protection is not only of great value to the workman but is to the economic advantage of the community and state. *The imposition of an additional award acts as a deterrent to every employer from omitting compliance with legal specific safety requirements and, in that respect, the additional award becomes compensation in the nature of a penalty.*

Id. at 669, 76 N.E.2d at 715 (emphasis added).[6] Ohio's system is, thus, primarily intended to deter employer

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[6] *See also State ex rel. Kroger Co. v. Industrial Commission*, 62 Ohio St. 2d 4, 6, 402 N.E.2d 528, 530 (1980) ("awards for violations of specific safety requirements are penal insofar as they affect employers"); *State ex rel. Bailey v. Krise*, 18 Ohio St. 2d 191, 198, 249 N.E.2d 55, 60 (1969) (Ohio system has "penal characteristic" which "affects the employer by requiring an increased premium 'to recoup the state fund in the amount of such additional award'") (quoting Ohio Const. Art. II, § 35); *State ex rel. Whitman v. Industrial Commission*, 131 Ohio St. 375, 379, 3 N.E.2d 52, 53 (1936) ("The additional award is in the nature of a penalty, and it was the purpose of the Constitution to impose such penalty upon the employer who failed to comply, and not upon him who did comply."). Furthermore, the

noncompliance with state-promulgated specific safety requirements, and to enforce compliance with those requirements, through the assessment of monetary penalties. *Id.*, 76 N.E.2d at 715; *see also State ex rel. Whitman v. Industrial Commission*, 131 Ohio St. 375, 379, 3 N.E.2d 52, 53 (1936). As such, it is clear that Ohio's system is a carefully crafted approach to state regulation of an employer's conduct, maintenance, and operation of his workplace.

Likewise, that Ohio's system of regulation is accomplished through payment or threat of payment of damage awards to persons injured due to a violation of a specific safety requirement, rather than through injunctions or fines payable to the State, does not alter the regulatory character of the scheme. As this Court has stated, the effect, and not the purpose, of a state's action governs the Supremacy Clause analysis. *See International Paper Co. v. Ouellette*, ___ U.S. ___, n.19, 107 S. Ct. 805, 815 n.19 (1987); *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). Thus, in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court held that California was precluded from providing a civil damages remedy with respect to certain labor union activity when the National Labor Relations Board had not adjudicated the status of that activity and the activity was arguably within the purview of the National Labor Relations Act. *Id.* at 246. The *Garmon* Court noted:

> Nor is it significant that California asserted its power to give damages rather than to

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Franklin County Court of Appeals' opinion in this case acknowledged that, under the Ohio system, "penalties result when the employer's conduct falls below a state established acceptable level." J.A.-15.

> enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme . . . . *It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two lawmaking sources to govern.*

Id. at 246-47 (emphasis added). *See also International Paper Co. v. Ouellette*, ___ U.S. at ___ n.19, 107 S. Ct. at 815 n.19 (when state compensatory damages remedy could compel adoption of "different or additional means of pollution control from those required by the [Clean Water] Act," the compensatory damages remedy has a regulatory effect). Here it is quite clear that the Ohio system of additional awards for violation of specific safety requirements is intended to have, and does have, the effect of altering and

controlling employer behavior in a number of areas.[7] It is thus clearly *regulatory in effect* for purposes of Supremacy Clause analysis.

Finally, appellee Miller's attempt to rely upon this Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), is similarly unavailing. In *Silkwood*, this Court concluded that Congress had expressly intended that state tort law remedies, including punitive damages awards, would be available to individuals injured by nuclear incidents at nuclear power plants. *Id.* at 255-56. The Court did not conclude, as appellee suggests, that punitive damages awards were not "regulatory" for purposes of preemption analysis. In fact, the Court stated:

> It may be that an award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something Congress was quite willing to accept.

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[7] It should be noted that the specific safety requirements which appellee seeks to impose upon appellant go far beyond mere regulation of scaffolding configurations. Ohio Administrative Code § 4121:1-5-03(D)(2), under which appellee makes his claim in this case, is only one provision of an extraordinarily detailed set of specific safety requirements applicable to workshops and factories. *See* Specific Safety Requirements of the Industrial Commission of Ohio relating to All Workshops and Factories, Ohio Admin. Code Chapter 4121:1-5. These requirements are hundreds of pages in length and govern, *inter alia*, tools, equipment, machinery, trucks, personal protective equipment, and ventilation and exhaust equipment.

Id. at 256. No such congressional acceptance can be found in this case.[8]

Moreover, it would be inappropriate to analogize Ohio's system to tort law remedies in any event. The "traditional principles of state tort law" which the *Silkwood* Court found not preempted, *see* 464 U.S. at 255, are predicated upon failure to comply with general standards of conduct—such as "reasonable care," "foreseeability," and "proximate cause"—as determined by a lay jury. The Ohio system, in contrast, concerns violation of specific safety requirements, promulgated by an administrative agency, which "have the effect of legislative enactments." *State ex rel. Miller Plumbing Co. v. Industrial Commission*, 149 Ohio St. 493, 496, 79 N.E.2d 553, 555 (1948). Indeed, Ohio law mandates that the specific safety requirements must be of sufficient definiteness to "forewarn the employer and establish a standard which he may follow." *State ex rel. Rae v. Industrial Commission*, 136 Ohio St. 168, 173, 24 N.E.2d 594, 597 (1939); *see also State ex rel. Hill v. Industrial Commission*, 172 Ohio St. 115, 173 N.E.2d 890 (1961). An early decision of the Ohio Supreme Court stated:

> [T]his court is committed to the principle that the term, 'specific requirement,' as used in

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[8] Not only is state safety regulation of federal facilities such as the Portsmouth plant specifically prohibited by the Atomic Energy Act, *see* 42 U.S.C. §§ 2061, 2021(c)(1), but the legislative history of another statute, 40 U.S.C. § 290, reveals that Congress expressly did not intend state safety regulations, such as the Ohio specific safety requirement system, to apply to federally owned facilities, such as the Portsmouth plant. *See* S. Rep. No. 2294, 74th Cong., 2d Sess. 2 (1936). This aspect of 40 U.S.C. § 290 will be discussed in greater detail *infra*.

> Section 35, Article II of the Constitution, does not comprehend a general course of conduct or general duties or obligations flowing from the relation of employer and employee, but embraces such lawful, specific and definite requirements or standards of conduct as are prescribed by statute or by orders adopted and promulgated by the Industrial Commission, and which are of a character plainly to apprise an employer of his legal obligations toward his employees.

State ex rel. Holdosh v. Industrial Commission, 149 Ohio St. 179, 182, 78 N.E.2d 165, 166 (1948). Ohio's system is further distinguishable from general tort law remedies in that liability is determined by an administrative body, imposition of damages is mandatory if a violation is found, and the amount of damages must fall within a specified range. *See* Ohio Const. Art. II, § 35.

In short, while Ohio's system may have been devised as a substitute for traditional tort law remedies, it can neither be characterized as, nor analogized to, such a remedy. Ohio's system of making additional awards for violation of specific safety requirements is plainly designed to influence and direct employer conduct through imposition of damages that are admittedly penal in nature. As such, the system quite clearly constitutes state regulation for purposes of Supremacy Clause analysis.

B. The Federally Owned Portsmouth Plant Is Constitutionally Exempt From the Attempted State Regulation Under the Supremacy Clause

1. The Attempted State Regulation Is Barred By the Doctrine of Federal Facility Immunity

It has long been recognized by this Court that the Supremacy Clause[9] and the Plenary Powers Clause[10] of the Constitution provide the Congress with exclusive authority over the regulation of federal facilities and activities. As early as 1819, in the seminal case of *McCulloch v. Maryland*, 4 Wheat. 316 (1819), this Court determined that

> [i]t is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, so as to exempt its own operations from their own influence.

Id. at 427. Thus, the Constitution provides for "immunity of the instruments of the United States from state control in the performance of their duties." *Johnson v. Maryland*, 254 U.S. 51, 57 (1920).

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[9] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, § 2.

[10] The Plenary Powers Clause provides Congress with exclusive legislative authority "over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. Const. Art. I, § 8, cl. 17.

The constitutional principle of a federally owned facility's immunity from state regulation has been repeatedly applied by this Court from its early cases to the modern era.[11] The leading modern case in the area is *Hancock v. Train*, 426 U.S. 167 (1976), where this Court held that, under Section 118 of the Clean Air Act, a state could not require a federal installation to obtain a state permit before operating. After noting the principle of federal immunity from state regulation, the *Hancock* Court stated:

> Taken with the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign" "without a clear expression or implication to that effect," this immunity means that where "Congress does not affirmatively declare its instrumentalities or property subject to regulation," "the federal function must be left free" of regulation. Particular deference should be accorded that "old and well-known rule" where, as here, the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign. Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to

[11] *See, e.g., Osborn v. Bank of the United States*, 9 Wheat. 738 (1820); *Ohio v. Thomas*, 173 U.S. 276 (1899); *Johnson v. Maryland*, 254 U.S. 51 (1920); *Mayo v. United States*, 319 U.S. 441 (1943).

> the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."

Hancock v. Train, 426 U.S. at 179.[12]

Consistent with this analysis, the *Hancock* Court then considered whether, in the Clean Air Act, Congress had manifested an intent to authorize states "to condition operation of federal facilities on securing a state permit." 426 U.S. at 180. Despite the language of Section 118 of the Clean Air Act, which required that federal entities "shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements," *id.* at 172, the Court concluded that Congress had not evinced an intent "to subject[] federal installations to state permit requirements" with "satisfactory clarity." *Id.* at 198. A similar decision was reached with respect to analogous provisions of the Federal Water Pollution Control Act Amendments in *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976), a case decided contemporaneously with *Hancock*.

The long line of Supreme Court cases culminating in *Hancock v. Train* articulate a clear principle: fed-

[12] Quoting, respectively, *United States v. United Mine Workers*, 330 U.S. 258, 272 (1947); *United States v. Wittek*, 337 U.S. 346, 359 (1949); *Mayo v. United States*, 319 U.S. 441, 447, 448 (1943); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954); *Paul v. United States*, 371 U.S. 245, 263 (1963); and *California ex rel. State Water Resources Control Board v. EPA*, 511 F.2d 963, 968 (9th Cir. 1975), *rev'd on other grounds*, 426 U.S. 200 (1976).

erally owned facilities are constitutionally immune from state regulation unless Congress has clearly and unambiguously authorized such regulation. Moreover, *Hancock* establishes that congressional enactments purportedly authorizing such regulation are to be strictly construed to determine whether the particular form of state regulation at issue has been authorized by Congress with "satisfactory clarity." *Hancock*, 426 U.S. at 198; *see also Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corporation*, 642 F.2d 527 (D.C. Cir. 1980) (strictly construing statutes and concluding that the statutes were ambiguous and thus did not authorize state regulation with requisite clarity). If specific congressional authorization is missing, the state regulation cannot constitutionally be applied.

In this case, the majority opinion of the Ohio Supreme Court did not mention, much less consider and distinguish, *Hancock* and the doctrine of a federal facility's constitutional immunity from state regulation. Nevertheless, it is quite clear that the doctrine applies and operates to bar the attempted state regulation. By law, the Department of Energy, "as agent of and on behalf of the United States shall be the exclusive owner" of production facilities such as the Portsmouth plant. 42 U.S.C. § 2061(a). The applicability of the doctrine is not changed by the fact that the federal facility is operated by a private entity pursuant to contract with the federal government. *Hancock* itself involved the Paducah, Kentucky, gaseous diffusion nuclear production facility, which, like the Portsmouth plant, is owned by the federal government and operated by private contractor. *See* 426 U.S. at 174 n.23.

It also cannot be contended that the immunity doctrine reiterated in *Hancock* is inapplicable because the Ohio scheme simply regulates appellant in its dealings with the federal government and thus merely "touch[es] the activities of the Federal Government." *Hancock*, 426 U.S. at 179. To be sure, this Court has previously permitted certain state regulation of private contractors who performed services for the federal government. *See, e.g., Penn Dairies, Inc. v. Pennsylvania Milk Control Commission*, 318 U.S. 261 (1943); *Alabama v. King & Boozer*, 314 U.S. 1 (1941). The indirect regulation at issue in those cases, however, is far removed from the regulation involved in the case at bar. Here Ohio's scheme would impose specific regulatory requirements upon the operation and management of a federal facility pursuant to a contractual relationship with the United States that is specifically authorized and largely delineated by Congress. *See* 42 U.S.C. § 2061(b). As such, the attempted state regulation would directly affect the functioning of a federal facility performing its designated duties.

This type of regulation is plainly impermissible. This Court has held, for example, that a state may not constitutionally regulate the supply of food to inmates of a federal soldier's home. *See Ohio v. Thomas*, 173 U.S. 276 (1899). In making provision for feeding the inmates, this Court noted, the governor of the soldier's home was "engaged in the internal administration of a Federal institution, and we think a state legislature has no constitutional power to interfere with such management as is provided by Congress." *Id.* at 282. Other than direct regulation of the federal government itself, it is difficult to conceive of state

regulation more onerous than the regulation sought to be imposed here—regulation which stipulates how a federal facility may be managed and operated and which provides for penal damage payments in the event of noncompliance.

Having established that the doctrine of federal facility immunity discussed in *Hancock* applies to this case, it becomes necessary to consider whether Congress has clearly and unambiguously expressed an intent to permit state regulation of the type involved in the Ohio scheme. Two statutes arguably could be cited in support of a finding that Congress has sanctioned such regulation. A careful analysis of these statutes, however, reveals that neither constitutes a clear and affirmative declaration of congressional intent, as *Hancock* requires.

The first statute, 42 U.S.C. § 2021(k), states: "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." Section 2021, however, deals with the Nuclear Regulatory Commission's authority to sign special agreements allowing states to regulate certain licensed nuclear facilities. *See* 42 U.S.C. §§ 2021(a), (b); *see also Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 208-10 (1983). Section 2021 expressly does not affect DOE's "authority and responsibility with respect to regulation of the construction and operation of any production or utilization facility," such as the Portsmouth plant. 42 U.S.C. § 2021(c)(1).

In addition, the legislative history of Section 2021(k), which was enacted in 1959 amendments to

the Atomic Energy Act of 1954, *see* Pub. L. No. 86-373, 73 Stat. 688, § 274(k), plainly states that the provision applies only to regulation of *licensees*, not federally owned production facilities: "This subsection is intended to make it clear that the bill does not impair the State authority to regulate activities of AEC licensees, for the manifold health, safety, and economic purposes other than radiation protection." S. Rep. No. 870, 86th Cong., 1st Sess., *reprinted at* 1959 U.S. Code Cong. and Admin. News 2872, 2880-81. Finally, "Section [2021(k)], by itself, limits only the preemptive effect of 'this section,' that is, [§ 2021], and does not represent an affirmative grant of power to the States." *Pacific Gas & Electric Co.*, 461 U.S. at 210.[13] Accordingly, since Section 2021 is inapplicable to federally owned nuclear production facilities, and since Section 2021(k) does not represent the necessary "affirmative grant of power to the States," Section 2021(k) does not and cannot constitute the "clear and unambiguous" authorization of state regulation required to divest a federal facility of its constitutional immunity. *See Hancock*, 426 U.S. at 179.

The other statute, 40 U.S.C. § 290, affords relevant state entities the authority to apply their "workmen's compensation laws" to

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[13] In *International Paper Co. v. Ouellette*, ___ U.S. ___, 107 S. Ct. 805 (1987), this Court construed a "savings clause" of the Clean Water Act in a similar manner. The Court stated that the savings clause "merely says that 'nothing *in this section*,' i.e., the citizen-suit provision, shall affect an injured party's right to seek relief under state law; it does not purport to preclude preemption of state law by other provisions of the Act." *Id.* ___ U.S. at ___, 107 S. Ct. at 812.

all land and premises owned or held by the United States of America . . . which is within the exterior boundaries of any State, and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

For the purposes set out in this section, the United States of America vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are affected, the right, power and authority aforesaid: *Provided, however*, that by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated . . . .

40 U.S.C. § 290.

Section 290 was enacted in 1936 in response to concerns raised by this Court's decision in *Murray v. Gerrick & Co.*, 291 U.S. 315 (1934). *See* S. Rep. No. 2294, 74th Cong., 2d Sess. 1-2 (1936); H.R. Rep. No. 2656, 74th Cong., 2d Sess. (1936). In *Murray*, this Court held that a state worker's compensation statute

had no force in a Navy yard that was a federal enclave, because the state statute was adopted after the state had ceded jurisdiction over the Navy yard. *Murray*, 291 U.S. at 319-20. In the aftermath of *Murray*, the bill that eventually became 40 U.S.C. § 290 was introduced "to fill a conspicuous gap in the workmen's compensation field by furnishing protection against death or disability to laborers and mechanics employed by contractors or other persons on Federal property." S. Rep. No. 2294, at 1.[14]

The legislative history of Section 290 reveals that that provision does not authorize the application of Ohio's system of additional awards for violation of specific safety requirements to federal facilities. While Section 290 does not define "workmen's compensation laws," there is nothing to suggest that Congress understood that phrase to encompass special payments for injuries resulting from an employer's failure to comply with safety regulations promulgated by state authorities.[15] Rather, it is likely that Congress

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[14] The legislative history of Section 290 indicates that its specific purpose was to provide workers' compensation to federal enclaves exclusively within the jurisdiction of the United States pursuant to the Plenary Powers clause, U.S. Const. Art. I, § 8, cl. 17. Indeed, a primary motivation of Congress was to provide protection for workers engaged in the construction of the Golden Gate bridge. *See* 80 Cong. Rec. 9181 (1936) (quoting H.R. Rep. No. 2656, *supra*). The scope of the statutory language, however, appears to extend to federal facilities that are not federal enclaves for purposes of the Plenary Powers clause.

[15] At the time of Section 290's enactment in 1936, only seven states, including Ohio, provided for additional employer payments in the event of an employer's failure to comply with safety requirements. *See* 2A A. Larson, *The Law of Workmen's Compensation* § 69.10, at 13-107-13-111 (1982).

envisioned the "typical workmen's compensation act," where "the basic operating principle is that an employee is automatically entitled to certain benefits whenever he suffers a 'personal injury by accident arising out of and in the course of employment,'" without regard to fault, negligence, or violation of safety regulations. *See* 1 A. Larson, *The Law of Workmen's Compensation* § 1.10, at 1 (1982). Significantly, the state law at issue in *Murray*, which led to the enactment of Section 290, involved just such a typical worker's compensation act. *See* 291 U.S. at 317, 318-19.

Two other matters strongly suggest that Congress did not intend Section 290 to authorize state regulation of the type at issue in this case. H.R. 12599, the House version of the bill which became 40 U.S.C. § 290, authorized application of state "safety" and "insurance" laws in addition to state workmen's compensation laws. *See* H.R. Rep. No. 2656, *supra*, at 1. The Senate, however, struck out "all provisions subjecting Federal property to State safety and insurance regulations." S. Rep. No. 2294, at 2. The Senate Report explained:

> These provisions were objected to by the procurement agencies of the Government inasmuch as such provisions would not only produce conflicts of authority between State and Federal officers but would also make a wide departure from the *well established principle that Federal officers should have complete charge of any regulations pertaining to Federal property*. It was the conclusion of the committee that the principal reform which this bill sought to achieve could be attained without the inclusion of these clauses.

S. Rep. No. 2294, *supra*, at 2 (emphasis added). The amended Senate version of the bill was then enacted. 80 Cong. Rec. 9180-81, 9643 (1936). Similarly, Section 290 itself provides that, through its enactment, "the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States . . . only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated." 40 U.S.C. § 290.

Thus, the legislative history of Section 290 clearly indicates that Congress specifically sought to withhold from states the authority to impose and enforce safety regulations, such as Ohio's system of specific safety requirements, upon a contractor's operations on federal property. Indeed, permitting Ohio to apply its system in this case would result in the dual State and Federal regulatory authority that caused the Senate to amend the legislation that became Section 290. *See* S. Rep. No. 2294, *supra*, at 2. In any event, Section 290 manifestly does not provide the sort of "clear and unambiguous" authorization of state regulation required by *Hancock v. Train*.

The doctrine of federal facility immunity upheld in *Hancock v. Train* governs this case and requires reversal of the Ohio Supreme Court's decision. Because Congress has not clearly announced its intent to allow state safety regulation of federally owned nuclear production and utilization facilities, Ohio's system of assessing additional awards for violation of specific

safety requirements cannot constitutionally be applied to govern conduct at the Portsmouth facility.

2. The Attempted State Regulation Impermissibly Impairs Performance of Federal Policies

Even assuming *arguendo* that the express federal immunity analysis of *Hancock v. Train* is somehow inapplicable to this case, a related Supremacy Clause doctrine requires reversal of the Ohio Supreme Court's decision. Where, as here, a state attempts to regulate a private entity's dealings with the federal government, this Court has examined whether the attempted regulation would frustrate or impair federal interests or programs, if only by imposing burdens that may impede the realization of federal goals. *See, e.g., United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963); *Paul v. United States*, 371 U.S. 245 (1963); *California Public Utilities Commission v. United States*, 355 U.S. 534 (1958); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956).[16] As such, it has been repeatedly held that, "a State is without power by reason of the Supremacy Clause to provide the conditions on which the Federal Government will effectuate its policies." *United States v. Georgia Public Service Commission*, 371 U.S. at 293.

The attempted state regulation here at issue plainly would impair federal programs and hamper achieve-

[16] This Court has suggested that this doctrine involves "more than an isolated issue whether a state law conflicts with a federal statute and therefore must give way by reason of the Supremacy Clause" and rather implicates the broader question of whether a state regulatory scheme is unconstitutional because it burdens the exercise by the federal government of its power "to carry out other constitutional functions." *United States v. Georgia Public Service Commission*, 371 U.S. at 287.

ment of federal goals at the Portsmouth facility. As was discussed *supra*, Ohio's system is a patent effort to regulate employer operation of workplaces through imposition of damage payments for violation of specific safety requirements promulgated by a state administrative body. As applied to the federally owned Portsmouth plant, Ohio's system would effectively regulate appellant's performance of federal functions and use of federal property for federal purposes by imposing obligations over and above those found to be appropriate by the United States. Appellant's fulfillment of its operational duties would be burdened by the need to comply with all specific safety requirements applicable to workshops and factories (which number in the hundreds of pages) upon the threat of damages penalties. *Cf. Johnson v. Maryland*, 254 U.S. at 59 (state regulation is impermissible when it "requires qualifications in addition to those that the Government has pronounced sufficient."). In addition, efficient performance of federal goals could be hindered by the investigation authority afforded the Industrial Commission and its agents under Ohio law. *See* Ohio Rev. Code §§ 4121.131, 4121.14-4121.17. Indeed, Ohio law permits the Commission, upon petition by any person that a place of employment is unsafe, to "proceed with or without notice to make such investigation as is necessary to determine the matter complained of." Ohio Rev. Code § 4121.17(A).[17]

[17] The interference with federal goals would be even more pronounced under recent amendments to Ohio's workers' compensation laws, which became effective on August 22, 1986. Under the revised law, when the Industrial Commission finds an employer "guilty" of violating a specific safety requirement, "it *shall*, in addition to any award paid to the claimant, issue

Moreover, the frustration of federal interests threatened by application of the Ohio scheme becomes even more compelling when the purpose and function of the Portsmouth plant is considered. As a "production facility," the Portsmouth plant is by definition performing a function "significan[t] to the common defense and security." *See* 42 U.S.C. § 2014(v)(1). In addition, the involved plant is one of only two facilities currently operating in the United States which enriches and refines feed materials to assays which may be used for civilian energy and national defense purposes. More importantly, it is the *only* operation capable of enriching uranium to an assay which is required by the United States Navy to power its nuclear ships and submarines. As a result of these plain national security considerations, the design and technology used at the Portsmouth plant is highly classified and access to the plant is severely restricted.

These important national security considerations, standing alone, weigh in favor of rejecting application of the state regulation at issue here. As this Court has repeatedly noted, it is both "obvious and unarguable" that "no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981).[18] Because Ohio's regulatory

an order to correct the violation within such period of time as the Commission fixes." Ohio Rev. Code § 4121.47(B) (emphasis added). In addition, if two violations of specific safety requirements occur within a twenty-four-month period, the Commission "shall assess against the employer a civil penalty in an amount the Commission determines up to a maximum of fifty thousand dollars for each violation." *Id.*; *see also* Ohio Admin. Code § 4121-3-20(K)(3), reprinted at J.A.-74-76.

[18] This Court has also stated that national security interests

scheme would clearly burden appellant's performance of functions that are critical to national security and the national defense, this Court should conclude that Ohio's scheme cannot constitutionally be applied to appellant's operation of the Portsmouth plant. *See United States v. Georgia Public Service Commission*, 371 U.S. at 293; *Leslie Miller, Inc. v. Arkansas*, 352 U.S. at 189.

C. The Atomic Energy Act Preempts State Occupational Health and Safety Regulation of Federally Owned Nuclear Production Facilities

Separate and apart from the constitutional considerations discussed previously, the Ohio Supreme Court's application of state-promulgated specific safety requirements to the Portsmouth plant is patently erroneous for an additional reason: such regulation is preempted by the Atomic Energy Act.

This Court has long recognized that state law can be preempted in two general ways. First, if Congress evinces "an intent to occupy a given field, any state law falling within that field is pre-empted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982). This congressional intent may take the form of an express declaration of preemption, *see Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), but "it is not necessary for a federal

"merit the most careful consideration." *United States v. United States District Court*, 407 U.S. 297, 319 (1972). *See also Meese v. Keene*, ___ U.S. ___, 107 S. Ct. 1862 (1987); *Regan v. Wald*, 468 U.S. 222 (1984).

statute to provide explicitly that particular state laws are preempted." *International Paper Co. v. Ouellette*, ___ U.S. ___, ___, 107 S. Ct. 805, 811 (1987); *see also Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). Rather, preemption may be presumed when the federal statute is "sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. at 713 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see also California Federal Savings and Loan Ass'n v. Guerra*, ___ U.S. ___, ___, 107 S. Ct. 683, 689 (1987); *R.J. Reynolds Tobacco Co. v. Durham County, North Carolina*, ___ U.S. ___, 107 S. Ct. 499, 507 (1986). Such congressional preemptive intent may be inferred from a

> "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."

Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. at 153 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230); *see also Pacific Gas & Electric Co. v. State Energy Resources Conservation*

and Development Commission, 461 U.S. 190, 204 (1983).

In addition, and even absent express or implied congressional intent to preempt, a state law "also is invalid to the extent that it 'actually conflicts with a . . . federal statute.'" *International Paper Co. v. Ouellette*, ___ U.S. at ___, 107 S. Ct. at 811 (quoting *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978)). Such a conflict exists not only when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1968), but also when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also International Paper Co. v. Ouellette*, ___ U.S. at ___, 107 S. Ct. at 811; *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. at 713.[19]

1. Through the Atomic Energy Act, Congress Intended to Preempt State Regulation of Occupational Health and Safety at Federally Owned Nuclear Production and Utilization Facilities

In one of its most recent pronouncements regarding the doctrine of preemption, this Court declared that it "must be guided by the goals and policies of the

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[19] While "courts should not lightly infer pre-emption," *International Paper Co. v. Ouellette*, ___ U.S. at ___, 107 S. Ct. at 811, this Court has not hesitated to find pre-emption when warranted. *See id.*, ___ U.S. at ___, 107 S. Ct. at 816 (application of Vermont nuisance law pre-empted by federal statute); *see also Rose v. Arkansas State Police*, ___ U.S. ___, 107 S. Ct. 334 (1986) (Arkansas worker's compensation law which conflicted with federal statute held invalid under Supremacy Clause).

Act in determining whether it in fact preempts an action based on the law of an affected State." *International Paper Co. v. Ouellette*, ___ U.S. at ___, 107 S. Ct. at 812. The Act of Congress herein involved—the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq.*—incorporates goals and policies that reveal a clear congressional intent to preempt state occupational health and safety regulation of federally owned nuclear production facilities.

Prior to 1954, "the use, control and ownership of nuclear technology remained a federal monopoly." *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. at 206. Through the Atomic Energy Act of 1954, however, Congress determined "that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing." *Id.* at 207 (citing H.R. Rep. No. 2181, 83d Cong., 2d Sess. 1-11 (1954)). The 1954 Act accordingly provided for "licensing of private construction, ownership, and operation of commercial nuclear power reactors." *Id.*; *see also Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 63 (1978). The United States government, however, retained "extensive control" over the manner in which the commercial development of atomic energy through a scheme of stringent and exclusive licensing authority. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 249-50; *see also* 42 U.S.C. §§ 2014(c), (z), (aa), 2071-2078, 2091-2099, 2111-2114.[20]

[20] Congress provided for an expanded state role in the 1959 amendments to the 1954 Act, which provide for state assumption of limited regulatory authority upon the execution of a cooperative agreement with the Atomic Energy Commission. *See* 42 U.S.C. § 2021; *see also Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. at 209-10. The responsibility for regulating nuclear licenses has since been assumed by the Nuclear Regulatory Commission. *See* 42 U.S.C. § 2201(i); S. Rep. No. 980, 93d Cong., 2d Sess. 82-85 (1974).

However, the statutory scheme providing for limited state regulatory authority over *commercial* nuclear power plants is wholly separate and distinct from the statutes and regulations governing *federally owned* nuclear production and utilization facilities.[21] With respect to such facilities, the 1954 Act provides for an *exclusive* federal role, and its language and history of administration clearly compel the conclusion that Congress intended that federally owned nuclear production and utilization facilities should not be subject to state regulation of the type attempted in this case.

The regulatory scheme governing the Portsmouth plant begins by requiring that DOE, as successor to the Atomic Energy Commission, "shall be the exclu-

[21] As was noted *supra* note 2, a "production facility" is one determined to be capable of producing "special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public." 42 U.S.C. § 2014(v)(1). A "utilization facility," on the other hand, is one determined to be capable of using "special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public." 42 U.S.C. § 2014 (cc)(1).

sive owner of all production facilities," with two exceptions not relevant to this case.[22] 42 U.S.C. § 2061(a). DOE "is authorized and directed to produce or to provide for the production of special nuclear material at the facilities," *id.* § 2061(b), and although DOE is authorized to contract with private entities to provide for production of special nuclear materials in DOE-owned facilities, it is required to closely direct and supervise production and to obligate its contractors to submit to inspections by DOE employees. *Id.* § 2061(b)(2)(A), (B). In addition, and most significantly, Congress mandated that DOE establish "standards and restrictions governing the design, location, and operation" of its production facilities "in order to protect health and to minimize danger to life or property." *Id.* § 2201(i)(3). This broad mandate included the express congressional directive that all contracts pertaining to operation of DOE-owned production facilities must obligate the contractor "to comply with all safety and security regulations which may be prescribed by" DOE. *Id.* § 2061(b)(2)(C).

The language and structure of the 1954 Act clearly indicate that Congress intended DOE and its predecessor agencies to have exclusive regulatory authority

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[22] The DOE is not required to own production facilities which involve conduct of specified research and development activities and which do not, in the DOE's opinion, have the capacity to produce special nuclear material sufficient to make an atomic weapon, or which are licensed by the DOE pursuant to special statutory provisions. *See* 42 U.S.C. § 2061(a)(1), (2). Such facilities in any event are not subject to the special contract regulation established by 42 U.S.C. § 2061(b), since that provision applies only to "research and development contracts authorizing the contractor to produce special nuclear material in facilities *owned by the* [*DOE*]." *Id.* § 2061(b) (emphasis added).

over the operation of federally owned nuclear production facilities such as the Portsmouth plant. No provision was made for *any* state regulation of such facilities. Furthermore, the 1959 amendments to the Act, which otherwise enlarged state regulatory authority with respect to commercial nuclear power plants, expressly rejected a similar state role in regulating federally owned production facilities, by providing that any cooperative agreement entered into with a state could not discontinue DOE's authority to regulate "the construction or operation of any production or utilization facility." 42 U.S.C. § 2021(c)(1).[23] The Senate Report on the 1959 Amendments explains:

> The bill applies to some, but not all, atomic energy activities now regulated exclusively

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[23] As was noted previously, 42 U.S.C. § 2021(k) does not suggest that Congress intended to permit states to regulate occupational health and safety at federally owned production and utilization facilities. Section 2021(k) states: "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." Section 2021 deals with the Nuclear Regulatory Commission's authority to sign cooperative agreements with states regarding regulation of licensed nuclear power plants and expressly does not concern federally owned production and utilization facilities. *See* 42 U.S.C. § 2021(c)(1); S. Rep. No. 870, *supra*, *reprinted at* 1959 U.S. Code Cong. and Admin. News 2880-82. By the use of "in this section," Section 2021(k) "limits only the pre-emptive effect of [§ 2021]," *see Pacific Gas & Electric Co.*, 461 U.S. at 210, and thus "does not purport to preclude preemption of state law by other provisions of the Act." *See International Paper Co. v. Ouellette*, ___ U.S. at ___, 107 S. Ct. at 812. Moreover, Section 2021(k) "does not represent an affirmative grant of power to the States." *Pacific Gas & Electric Co.*, 461 U.S. at 210.

by AEC . . . . Licensing and regulation of more dangerous activities—such as nuclear reactors—will remain the exclusive responsibility of the Commission. Thus a line is drawn between types of activities deemed appropriate for regulation by individual States at this time and other activities where continued AEC regulation is necessary.

• • •

[Section 2021(c)] excludes certain areas from an agreement under subsection b. between the Commission and the Governor of a State. These are areas which, because of their special hazards, or for reasons of Federal responsibility, are believed desirable for continued responsibility by the Commission. They include the construction and operation of production or utilization facilities . . . .

S. Rep. No. 870, *reprinted at* 1959 U.S. Code Cong. and Admin. News 2879, 2880-81.

It is thus clear that Congress intended federally owned nuclear production facilities to be governed by a comprehensive set of regulations developed and administered by DOE and its predecessor agencies. Within this comprehensive scheme, there is simply no room for state regulation. See *International Paper Co. v. Ouellette*, ___ U.S. at ___, 107 S. Ct. at 711; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.[24]

[24] Thus, courts have uniformly held that any state or private activity which attempts to regulate, supervise or in any way deal with matters similarly subject to DOE authority is *per se* invalid and preempted by federal law. *See County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52 (2d Cir. 1984); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). In addition, congressional intent to preempt state regulation of federally owned production and utilization facilities may also be surmised from the fact that those facilities are explicitly defined as involving national defense and security. *See* 42 U.S.C. §§ 2014(v), (cc).

Here, the Act "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230; *see also Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. at 153.

The conclusion that DOE is intended to exercise exclusive regulatory authority over occupational health and safety at federally owned production facilities is further buttressed by administrative construction of the Act. For more than 40 years, DOE and its predecessor agencies have interpreted the Atomic Energy Act of 1946 and the Atomic Energy Act of 1954, as amended, to afford them exclusive authority over such health and safety matters. As this Court has noted, "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the express intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, ___, 106 S. Ct. 455, 461 (1985); *see also Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843-44 (1984). Manifestly, DOE's construction of the Act not only is reasonable and not in conflict with congressional intent, but also is entirely consistent with Congress'

express mandate that DOE require its contractor-operators to "comply with all safety and security regulations" promulgated by DOE. 42 U.S.C. § 2061(b)(2)(C).[25]

Moreover, DOE has acted pursuant to the congressional directives contained in 42 U.S.C. §§ 2061(b)(2)(c) and 2201(i)(3) and promulgated an extensive set of health and safety regulations. *See* notes 3 and 4, *supra*. Through these regulations, DOE has established a pervasive and comprehensive regulatory system that governs both radiological and nonradiological health and safety at its federally owned, contractor-operated facilities. These regulations, which include detailed standards pertaining to scaffolding, *see* DOE Order 5483.1A, at I-1 (incorporating 29 C.F.R. § 1910.28), are made applicable through DOE's management contracts, which *inter alia*, provide for imposition of penalties in the event that the contractor "fails to comply with said regulations or requirements of DOE."[26] As this Court recently stated,

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[25] It is also significant that DOE's regulatory authority over its production facilities has been construed as precluding regulation by the Occupational Safety and Health Administration. In the Occupational Safety and Health Act, § 54(b)(1), Congress specifically exempted from Labor Department regulation the "working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1). This statutory exemption was explicitly recognized by the Secretary of Labor as precluding occupational health and safety regulation of government-owned, contractor-operated DOE facilities, such as the Portsmouth plant. *See* J.A.-85-87.

[26] Appellee Miller places great emphasis on the contractual provision requiring contractor compliance with "applicable" state law. "Applicable" state laws include worker's compensation laws, local fire regulations, and the like. DOE and its predecessors have always considered state laws regulating occupational safety and health to be *inapplicable* to federally owned production facilities, however. Indeed, this case represents the first time in the documented history of operation of DOE-owned production facilities that imposition of state-promulgated occupational health and safety standards has been attempted in state administrative or judicial proceedings. Thus, the contractual provision cited by appellee cannot be construed as requiring appellant to submit to Ohio's scheme for making additional awards for violation of specific safety requirements.

"where, as in this case, Congress has entrusted an agency with the task of promulgating regulations to carry out the purposes of a statute, . . . as part of the pre-emption analysis we must consider whether the regulations evidence a desire to occupy the field completely." *R.J. Reynolds Co. v. Durham County, North Carolina*, ___ U.S. ___, ___, 107 S. Ct. 499, 511 (1986). Here the comprehensive nature of DOE regulatory scheme, coupled with DOE's consistent interpretation of the Act as providing it with exclusive regulatory authority over occupational safety and health at its federally owned production facilities, strongly "evidence a desire to occupy the field completely."[27]

In summary, the language, history, and administrative construction of the Atomic Energy Act of

[27] This Court has frequently stated that "[f]ederal regulations have no less pre-emptive effect than federal statutes" and that the pre-emptive force of a regulation "does not depend upon an express congressional authorization to displace state law." *Fidelity Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153-54 (1982); *see also Louisiana Public Service Comm'n v. Federal Communications Comm'n*, ___ U.S. ___ ___, 106 S. Ct. 1890, 1898 (1986); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984).

1954, as amended, all point to the conclusion that Congress intended the Act to preempt any state regulation of occupational health and safety at federally owned production facilities. As such, Ohio's system of additional awards for violation of specific safety requirements cannot constitutionally be applied to regulate appellant's operation of the Portsmouth plant.[28]

2. The Ohio Scheme Cannot Be Applied to the Portsmouth Plant Because It Stands As An Obstacle to Accomplishment of the Full Purposes and Objectives of Congress

Finally, this case also implicates the second approach to preemption analysis, which focuses upon

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[28] In concluding that there was no preemption in this case, the Ohio Supreme Court failed to recognize the distinct regulatory schemes governing nuclear power plants and federally owned nuclear production facilities and relied upon this Court's decision in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), in concluding that the attempted state regulation of the Portsmouth plant was permissible. This reliance was quite clearly improper for several reasons. First, as has been discussed *supra*, *Silkwood* concerned the availability of traditional tort law remedies to a victim of alleged radiation poisoning, *see* 464 U.S. at 255, and did not involve application of state regulation to a federal facility. Second, *Silkwood* was decided in the context of a privately owned facility licensed by the Nuclear Regulatory Commission and subject to numerous areas of state regulation. *See Silkwood*, 464 U.S. at 241 (case involved nuclear facility owned by Kerr-McGee Corp. and "subject to licensing and regulation by the Nuclear Regulatory Commission"). The Portsmouth plant, as a federally owned nuclear production and utilization facility, is subject to a different statutory scheme that involves exclusive federal regulation by DOE. As such, the Ohio Supreme Court's use of *Silkwood* as a basis for its decision was entirely misplaced, and the Ohio Supreme Court's extraordinarily cursory treatment of the preemption question may be disregarded.

whether the involved state scheme "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. at 67; *see also International Paper Co. v. Ouellette*, ___ U.S. at ___, 107 S. Ct. at 811; *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. at 713. Here, application of Ohio's system of assessing additional awards for violation of specific safety requirements would hinder accomplishment of the purposes and objectives of the Atomic Energy Act of 1954, as amended, in several ways.

First, application of the Ohio scheme to the Portsmouth plant would impose substantial and far-reaching additional regulation on operation of the federally owned nuclear production facility. This new state regulation would necessarily impose additional costs upon operation of the plant and could impair plant efficiency. More importantly, however, permitting state regulation would make appellant subject to two regulatory masters. Appellant clearly is subject to occupational safety and health regulation by DOE by reason of federal statute, *see* 42 U.S.C. § 2061(b)(2)(c), and by reason of its operating contract. Application of Ohio's system would impose another, different layer of occupational safety and health requirements upon the plant's operation.

In *International Paper Co. v. Ouellette*, ___ U.S. ___, 107 S. Ct. 805 (1987), this Court held that application of the nuisance law of Vermont, a non-source state, was preempted when it "would compel the source to adopt different control standards and a different compliance schedule from those approved by the [Environmental Protection Agency], even

though the [non-source] affected State had not engaged in the same weighing of the costs and benefits." *Id.*, ___ U.S. at ___, 107 S. Ct. at 813. Similarly, the *Ouellette* Court found that availability of compensatory relief under a non-source state's nuisance law might compel the adoption of "different or additional means of pollution control from those required by the Act," a result that would be "irreconcilable with the [Clean Water Act's] exclusive grant of authority to the Federal Government and the Source State." *Id.*, ___ U.S. at ___ n.19, 107 S. Ct. at 815 n.19.

The *Ouellette* analysis is clearly applicable to the instant case. Through the Atomic Energy Act of 1954, Congress has afforded DOE extensive authority to promulgate occupational safety and health standards governing contractor operation of federally owned production and utilization facilities. Pursuant to this statutory authority, DOE has devised and enforced a set of detailed occupational safety and health regulations. Because Ohio's scheme would impose additional and different standards upon contractor operation, it would serve to frustrate the Act's goal of uniform federal regulation of occupational health and safety at federally owned production and utilization facilities. *See San Diego Building Trades Council v. Garmon*, 359 U.S. at 247 (permitting state to impose damages for certain union activity "involves a conflict with federal policy in that it involves allowing two law-making sources to govern."). Application of Ohio's system thus "stands as an obstacle" to the full achievement of the Act's purposes and should be found preempted.[29] *Ouellette, supra*; *see also*

[29] The mere fact that both the comprehensive DOE safety and health regulatory scheme and the Ohio system are designed to protect worker safety does not alter the analysis. As this Court stated in *International Paper Co. v. Ouellette*:

> In determining whether Vermont nuisance law "stands as an obstacle" to the full implementation of the [Clean Water Act], it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the method by which the federal statute was designed to reach this goal.

___ U.S. at ___, 107 S. Ct. at 813 (*citing Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Board*, 467 U.S. 461, 477 (1984)).

Jones v. Rath Packing Co., 430 U.S. 519, 541-43 (1977) (state packaging requirement that imposed different standards than federal law held preempted); *Hines v. Davidowitz*, 312 U.S. 52, 73-74 (1941) (state law which imposed different alien registration standards than federal law held preempted).[30]

Finally, imposition of Ohio's scheme also would thwart an additional objective of the Act: to control and safeguard against inappropriate disclosure of nuclear technology information. *See* 42 U.S.C. §§ 2161-2168. In accordance with this policy, DOE is author-

[30] That Ohio's scheme might simply regulate areas not regulated by the DOE, rather than imposing requirements that directly conflict with DOE regulations, is not material to this analysis. "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983) (emphasis by the Court); *see also Fort Halifax Packing Co., Inc. v. Coyne*, ___ U.S. ___, ___, 107 S. Ct. 2211, 2222 (1987) (under National Labor Relations Act, conduct unregulated by Congress is to be left unregulated by the states).

ized to "prescribe such regulations or orders as it may deem necessary to protect Restricted Data received by any person in connection with any activity authorized pursuant to this chapter," *id.* §2201(i)(1), and its contractor-operators are expressly required to comply with such "security regulations" as DOE may promulgate. *Id.* § 2061(b)(2)(C). Given the clear national defense and security considerations involved in operating facilities such as the Portsmouth plant, *see id.* §§ 2014(v), (cc), it is likely that Congress mandated federal ownership and control of such facilities in part to protect against disclosure of important national security information.

In vesting DOE with authority to promulgate both radiological and non-radiological safety and health standards at nuclear production facilities, and mandating that they retain exclusive ownership of and control over those facilities, Congress expressed a clear intent that those federal operations be left unfettered by state regulation. Permitting the imposition of state promulgated safety standards on the facility here involved would clearly "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. at 67. On that basis alone, the Ohio scheme should be found to be preempted.

CONCLUSION

A careful analysis of the instant case reveals that Ohio's attempted regulation of the operation of the federally owned Portsmouth plant is constitutionally impermissible. Ohio's system of assessing additional awards for violation of specific safety requirements constitutes state regulation from which the Portsmouth plant, as a federal facility, is constitutionally immune under the Supremacy Clause doctrine articulated in *Hancock v. Train*.

In addition, the attempted state regulation represents an improper intrusion into the performance of federal policies at the Portsmouth plant. The Atomic Energy Act of 1954, as amended, erects a comprehensive regulatory scheme for production and utilization facilities that leaves no room for supplementary state regulation. Application of Ohio's safety standards and additional awards system to the Portsmouth plant would frustrate and burden fulfillment of the objectives of that Act. Based upon the principles most recently affirmed in *International Paper Co. v. Ouellette*, such state regulation is clearly preempted.

For the above reasons, this Court should reverse the decision of the court below.

Respectfully submitted,

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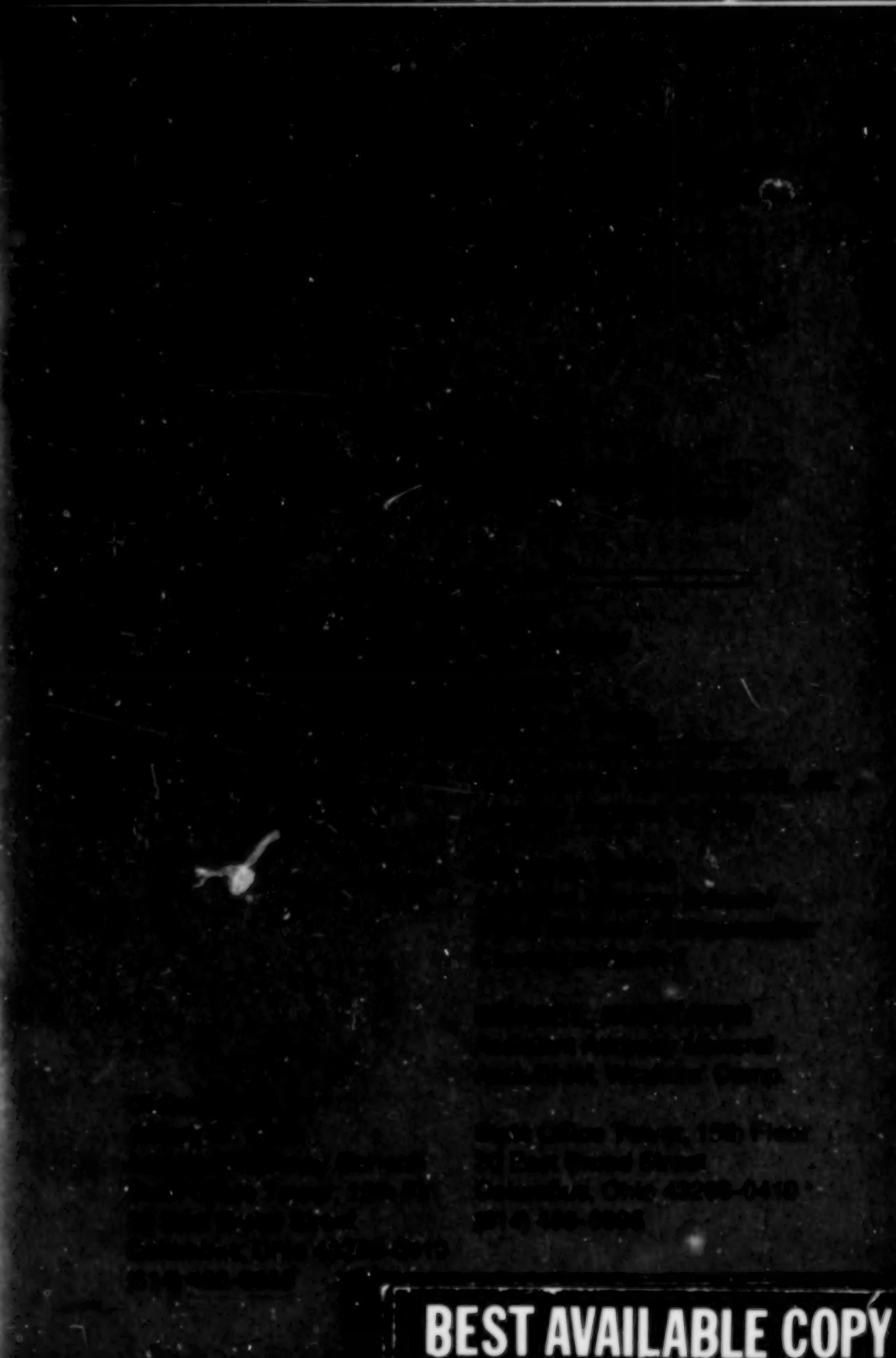
BRIEF



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QUESTIONS PRESENTED

A. Whether, under the Supremacy Clause of the United States Constitution, a private contractor operating a federal nuclear facility is immune from application of state, non-radiological safety requirements which are an integral part of a state's workers' compensation law, when Congress has provided that state workers' compensation laws apply to federal facilities?

B. Whether Congress, in the Atomic Energy Act of 1954, as amended, preempted the exercise of state police powers in the form of workers' compensation specific safety requirements as they apply to private contractors operating federal nuclear facilities?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

SUMMARY OF ARGUMENT 2

COUNTERSTATEMENT OF FACTS 3

ARGUMENT 6

I. Ohio's System of Providing Additional Awards For Violations Of Specific Safety Requirements Is Primarily Compensatory And Remedial And Does Not Constitute State "Regulation" For Purposes Of Supremacy Clause Analysis 6

A. Ohio's System Is Not Primarily Penal In Nature 6

B. Ohio's Specific Safety Requirements Are Applied to Peripheral Matters Which Are Left To State Control 14

C. Ohio's Workers' Compensation System Is Intended to Replace Traditional Tort Remedies For Workers Injured in The Course of Employment 16

II. Goodyear Atomic Corporation, as a Federal Contractor, Is Not Constitutionally Immune From Application Of Ohio's Specific Safety Requirements 18

A. Congress Has Clearly and Unambiguously Provided That State Workers' Compensation Laws Apply to Federal Facilities 18

B. Congress Evidenced A Clear And Unambiguous Intent To Apply State Workers' Compensation Laws To Contractor-Operated Federal Facilities 23

C. The Atomic Energy Act Expressly Reserves The Rights Of States To Regulate Non-Radiological Safety Matters At Nuclear Facilities 26

D. Federal Policies Are Not Obstructed By The Application Of Ohio's Workers' Compensation Laws To Goodyear's Activities At The Portsmouth Plant 31

III. Ohio's Specific Safety Requirements Are Not Preempted By The Atomic Energy Act 34

A. To Supercede A State's Police Power, A Clear And Manifest Intent Must Be Present 35

B. Neither The Atomic Energy Act Nor the Regulations Promulgated Thereto Evidence A Congressional Intention To Preempt State Safety Requirements 36

C. Goodyear's Status As A Federal Contractor Does Not Immunize It From Application Of Ohio's Occupational Safety Requirements 39

D. Ohio's Specific Safety Requirements Are Not Preempted By DOE's Regulatory Scheme 42

E. Application of Ohio's Specific Safety Requirements To A Federal Contractor Does Not Stand As Obstacle To The Accomplishment Of The Purpose Of The Atomic Energy Act 46

TABLE OF AUTHORITIES

CASES: Page

Alabama v. King & Boozer, 314 U.S. 1 (1941) 26

Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) 13

Austin Co. v. Brown, 121 Ohio St. 271, 167 N.E. 874 (1929) 10

Bethlehem Steel Co. v. New York State Labor Relations Bd.,330 U.S. 767 (1947) 34

California Federal Sav. and Loan Ass'n. v. Guerra, ___ U.S. ___, 107 S. Ct. 683 (1987) 43

California v. Zook, 336 U.S. 725 (1949) 33

Capital Cities Cable, Inc. v Crisp, 476 U.S. 691 (1984) 44

Cleveland v. P.U.C., 64 Ohio St. 2d 209, 414 N.E.2d 718 (1980) 39

DeCanas v. Bica, 424 U.S. 351 (1976) 36, 47

Environmental Protection Agency v. California, 426 U.S. 200 (1976) 24

Fidelity Savings and Loan Ass'n. v. De la Cuesta, 458 U.S. 141 (1982) 44

Florida Lime and Avacado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 34

Hancock v. Train, 426 U.S. 167 (1976) 23, 24

Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963) 29, 36

Table of Authorities Continued

Page

Hillsborough County v. Automated Medical Labs Inc., 471 U.S. 707 (1985) 35, 44, 45, 46

Hines v. Davidowitz, 312 U.S. 52 (1941) 46

Huntington v. Attril, 146 U.S. 657 (1892) 13

Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) 35, 47

International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958) 15

International Paper Co. v. Ouellette, ___ U.S. ___, 107 S. Ct. 805 (1987) 14

James Stewart and Co. v. Sadrakula, 309 U.S. 94 (1940) 26

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 34, 35

Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) 36

Legal Environmental Assistance Foundation v. Hodel, 586 F. Supp. 1163 (E.D. Tenn. 1984) 44

Louisiana Public Service Comm'n. v. F.C.C., 476 U.S. 355 (1986) 43

Malone v. White Motor Co., 435 U.S. 497 (1978) 43

Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973) 33

New Hampshire v. Atomic Energy Comm'n., 406 F. 2d 170 (1st Cir. 1969), *cert. denied*, 395 U.S. 962 (1969) 39, 45

Table of Authorities Continued

Page

New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973) 35, 47

Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972) 31, 39

Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n., 461 U.S. 190 (1983) 38, 39, 46

Pacific Legal Found. v. State Energy Resources, 659 F.2d 903 (9th Cir. 1981), *aff'd*, 461 U.S. 190 (1983) 29, 30

Penn Dairies v. Milk Contol Comm'n., 318 U.S. 261 (1943) 26, 29, 31, 32

Perez v. Campbell, 402 U.S. 637 (1971) 15

Powell v. United States Cartridge Co., 339 U.S. 497 (1950) 25

Retail Clerks International Ass'n., v. Schermerhorn, 375 U.S. 96 (1963) 36

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 34, 43

San Diego Building Trades Counsel v. Garmon, 359 U.S. 236, (1959) 15

Schwartz v. Texas, 344 U.S. 199 (1952) 35

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 15, 18, 37, 38, 41, 42

Slatmeyer v. Industrial Commission, 115 Ohio St. 654, 155 N.E. 484 (1926) 10

Table of Authorities Continued

Page

Spiller v. Atchison, T. & S.F.R. Co., 253 U.S. 117, (1920) 13

State, ex rel. Bailey v. Krise, 18 Ohio St. 2d 191, 249 N.E. 2d 55 (1969) 12, 16

State, ex rel. Emmich v. Industrial Commission, 148 Ohio St. 658, 76 N.E. 2d 710 (1947) 11, 12

State, ex rel. Engle v. Industrial Commission, 142 Ohio St. 425, 52 N.E. 2d 743 (1944) 9, 10

State, ex rel. Kroger Co. v. Industrial Commission, 62 Ohio St. 2d 4, 402 N.E. 2d 528 (1980) 12, 21

State, ex rel. Rudd v. Industrial Commission, 116 Ohio St. 67, 156 N.E. 107 (1927) 16

State, ex rel. Whitman v. Industrial Commission, 131 Ohio St. 375, 3 N.E. 2d, 52 (1936) 12

Tasner v. U.S. Industries, Inc., 379 F. Supp. 803 (N.C. Ill. 1974) 14

United States v. Boyd, 378 U.S. 39 (1964) 40

United States v. City of New York, 463 F. Supp. 604 (S.D.N.Y. 1978) 31

United States v. County of Fresno, 429 U.S. 452 (1977) 40

Table of Authorities Continued

Page

United States v. Pennsylvania Environmental Hearing Board, 584 F.2d 1273 (3rd Cir. 1978) 24, 25

Winfree v. Northern Pacific Railroad Co., 173 F. 65 (9th cir. 1909) aff'd 227 U.S. 296 (1913) 13

CONSTITUTIONAL PROVISIONS:

U.S. Constitution Article VI 34

U.S. Constitution Tenth Amendment 34

Ohio Constitution Article II, Section 35 ....4, 6, 7, 14, 21, 40

STATUTES AND ADMINISTRATIVE RULES:

5 U.S.C. §553 45

40 U.S.C. §290 ..... 1, 2, 5, 18, 19, 24, 34

42 U.S.C. §1857 23

42 U.S.C. §2011 32

42 U.S.C. §2013(a) 26

42 U.S.C. §2013(c) 26

42 U.S.C. §2013(d) 26, 37

42 U.S.C. §3018 27

42 U.S.C. §2021 27

42 U.S.C. §2021(b) 27, 28

42 U.S.C. §2021(c) 5, 28, 41

42 U.S.C. §2021(k) 1, 2, 5, 24, 28, 34, 38

Table of Authorities Continued

Page

42 U.S.C. §2061 41

42 U.S.C. §2061(b)(2)(B) 41

42 U.S.C. §2061(b)(2)(C) 41

42 U.S.C. §2132 26

42 U.S.C. §2133 27

42 U.S.C. §2201(b) 37

42 U.S.C. §2201(i)(3) 44

42 U.S.C. §5801 *et seq.* 27

42 U.S.C. §7151 *et seq.* 27

Ohio Revised Code §4121.13 ..... 1, 5, 8

Ohio Revised Code §4121.14 21

Ohio Revised Code §4121.17 21

Ohio Revised Code §4121.131 ..... 8, 22

Ohio Revised Code §4121.35(B)(4) 13

Ohio Revised Code §4121.37 22

Ohio Revised Code §4123.01(B) 40

Ohio Revised Code §4123.23 21

Ohio Revised Code §4123.26 21

Ohio Revised Code §4123.28 21

Table of Authorities Continued

	Page
Ohio Revised Code §4123.35(A)	4, 21
Ohio Revised Code §4123.35(B)	21
10 C.F.R. §8.4(i)	45
10 C.F.R. §150.15(a)(1)	45
29 C.F.R. §1910.28	44
Ohio Administrative Code §4121:1-5-03(D)	4
Ohio Administrative Code §4121-3-20	13
Ohio Administrative Code §4123-3-20	13
OTHER AUTHORITIES:	
S. Rep. No. 2294, 74th Cong., 2d Sess. (1936)	18
S. Rep. No. 1699, 83rd Cong., 2nd Sess. (1954)	41
S. Rep. No. 870, 86th Cong., 1st Sess. (1959)	28, 29, 30, 37, 38
S. Rep. No. 1605, 89th Cong., 2nd Sess. (1966)	17
A. Larson, *The Law of Workmen's Compensation*, §69.10 at 13-107 (1982)	20
Young, *Ohio Workman's Compensation Law*	13

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Code Title 40, Section 290:

Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State, and to all projects, buildings, constructions, improvements and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

United States Code Title 42, Section 2021(k):

State regulation of activities for purposes other than protection against radiation hazards. Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activites for purposes other than protection against radiation hazards.

Ohio Revised Code, Section 4121.13(c):

The industrial commission shall:

(c) Ascertain, fix, and order such reasonable standards for the construction, repair, and maintenance of places of employment as shall render them safe;[1]

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[1]In its argument, Goodyear relies on Ohio Revised Code §4121.47. That section, however, did not become effective until August 22, 1986 and thus is not applicable to this case.

SUMMARY OF THE ARGUMENT

The Ohio Supreme Court correctly held Ohio's non-radiological, occupational safety requirements apply to a private contractor operating the federally-owned Goodyear Atomic Plant in Portsmouth, Ohio. This application does not violate the Supremacy Clause nor are Ohio's safety rules preempted by the Atomic Energy Act.

Ohio's specific safety requirements are an integral, inseparable portion of its entire workers' compensation law. Awards made to workers because of employer violations of the safety requirements are compensatory and remedial in nature and do not constitute regulation for purposes of Supremacy Clause analysis. The characterization of the VSSR awards as compensation is supported by the wording of the law and the genesis of the rights conferred along with subsequent interpretations by the Ohio courts.

Furthermore, Goodyear's status as a private contractor operating a Federal facility does not render it immune from the application of state safety requirements. Congress has specifically vested the states with the authority to enforce their workers' compensation laws, in their entirety, at contractor-operated federal facilities. 40 U.S.C. §290. Additionally, the Atomic Energy Act reserves to the states the authority to regulate non-radiological hazards at nuclear facilities. 42 U.S.C. §2021(k). Thus, Congress' intention that Ohio's safety requirements apply to the Goodyear plant is clearly expressed.

Nor are Ohio's safety requirements preempted by the Atomic Energy Act. Before inferring preemption of a state's exercise of its police powers, Congress must express a clear and manifest purpose to do so. No such intention is present in the Atomic Energy Act. To the contrary, Congress has specifically reserved state authority over non-radiological issues relating to nuclear facilities. 42 U.S.C. §2021(k). This interpretation of Congressional intent is supported by this Court's decisions, as well as the regulations promulgated by the Atomic Energy Commission. The complexity of the regulatory

scheme accompanying the AEA alone is insufficient to preempt state law. Agency regulations may only preempt state laws if they are reflective of a Congressional intention to preempt. Again, no such intention is present in the Atomic Energy Act.

Finally, Goodyear's status as a federal contractor cannot be employed as a shield against the application of Ohio's safety requirements. This Court has recognized that state regulations are applicable to federal contractors even though the regulation may eventually impose a burden on the federal facility. Having recognized the applicability of Ohio's Workers' Compensation Laws to its facility, Goodyear cannot convincingly argue that the application of the safety requirements impose any more than an increased administrative burden on the plant's operation. Ohio's safety requirements in no way impede the purposes of the Atomic Energy Act.

COUNTERSTATEMENT OF THE CASE
STATEMENT OF THE FACTS

Appellee, Esto R. Miller (Miller), an employee of Appellant, Goodyear Atomic Corporation, Portsmouth Gaseous Diffusion Plant, (Goodyear) was injured on July 30, 1980, when he fell from the mobile scaffolding unit on which he was working. Miller suffered a factured left ankle and crushed and dislocated left heel as a result of the fall. (JA 40-41).

Goodyear contracts with the Federal Government to operate the Portsmouth plant. It is a private contractor receiving compensation for operating the Portsmouth plant. Goodyear's employees are not federal employees and are afforded the full protection of Ohio's workers' compensation laws as are the employees of any other private employer in Ohio.

As a private contractor, Goodyear is a "state fund" employer (for purposes of operating the Gaseous Diffusion Plant), which participates in the state insurance fund. Goodyear's status is verified by the claim number assigned to Miller's benefit claim. (JA-43). As a "state fund" employer, Goodyear regularly pays

premiums to the Ohio workers' compensation state insurance fund. Ohio Rev. Code 4123.35 (A). In return, Goodyear is protected from common law tort actions by its employees who are injured in the course of their employment. Ohio Const. Art. II §35. Goodyear certified Miller's industrial claim as valid and, as a result, Miller was paid approximately $9,000 in workers' compensation benefits from Ohio's state insurance fund. (Goodyear brief p.8).

Upon returning to work, Miller applied for an additional award for the employer's violation of a specific safety requirement. (VSSR award) (JA-40). Miller's application alleged a violation of Ohio Administrative Code Section 4121:1-5-03 (D) (2), which states that with respect to manually propelled mobile work platforms and rolling scaffolds, "exposed surfaces shall be free from sharp edges, burrs or other projecting parts." (JA-32)

The 1923 amendment to the Ohio Constitution empowered the Industrial Commission of Ohio to adopt specific safety requirements to ensure safe working conditions for Ohio workers. Ohio Constn. Art. II §35. The amendment provides the Commission may make an additional award to an employee whose injury, disease or death is a result of his employer's failure to comply with any specific requirement for the protection of life, health or safety of employees.

The decision of the Commission regarding additional awards is final. Ohio Constn. Art. II §35. If, upon hearing, the Commission makes a finding that the injury, death, or disease was the result of a violation of a specific safety requirement, the constitutional provision authorizes an additional award to be paid by the employer. The VSSR award is limited to not less than fifteen percent of the maximum compensation award made under the Act but cannot be greater than fifty percent of such maximum award. The Commission has complete discretion to set an amount which is within those limitations. The constitutional amendment further provides the award is to be paid, in the case of a "state fund" employer, from the state insurance fund and that the employer's workers' compensation premium

is to be increased over a period of time in order to reimburse the state insurance fund in the amount of the additional award Ohio Rev. Code §4121.13.

The Industrial Commission (Commission) initially denied Miller's application because the members believed the state safety requirements, as applicable to the Goodyear facility, were preempted by the Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (current version at 42 U.S.C. §2011-2296 (1982)) (AEA). (JA-18.) Miller pursued the additional award through an action in mandamus brought in the Franklin County, Ohio, Court of Appeals. That Court reversed the Commission order and issued a writ of mandamus ordering the Commission to take jurisdiction over Miller's application for a VSSR award. (JA-12). At this point in time, the Commission determined it would not appeal the Court's reversal of its order. Upon appeal, the Ohio Supreme Court affirmed the Court of Appeals, holding that the Ohio safety requirements are not preempted by the AEA. (JA-4). It is from this decision that Goodyear takes the instant appeal.

The Atomic Energy Act of 1954, provides the United States Department of Energy will exclusively own all nuclear production facilities located in the United States. 42 U.S.C. §2021(c). One such facility is the Portsmouth Plant. The AEA, however, preserves, in the states, the power to regulate non-radiological hazards such as unsafe scaffolding. 42 U.S.C. §2021(k).This provision applies to nuclear production facilities as well as nuclear power plants. The AEA contains no language exempting state regulation of non-radiological hazards at nuclear facilities.

Additionally, the federal statutory scheme governing facilities, sucn as those owned by the Department of Energy, includes 40 U.S.C. §290 which mandates that state workers' compensation laws be applied to federal property, buildings and facilities located within that particular state. This statute, in order to fully protect workers at federal facilities, vests the states with the authority to apply the entirety of their workers' compensation laws to those facilities.

Appellee Ohio Industrial Commission asserts the Ohio Supreme Court was correct in holding there is no federal preemption of Ohio's safety requirements by the Atomic Energy Act. The decision of the Ohio Supreme Court follows well-established case law and express statutory language reserving to the states the authority to apply non-radiological health and safety standards to nuclear facilities. No court has ever held private contractors such as Goodyear immune from the exercise of the State's police power in non-radiological areas.

ARGUMENT

I. Ohio's System of Providing Additional Awards for Violations of Specific Safety Requirements is Primarily Compensatory and Remedial and Does Not Constitute State "Regulation" for Purposes of Supremacy Clause Analysis.

A. Ohio's System Is Not Primarily Penal In Nature.

Appellant, Goodyear Atomic Corporation, argues Ohio's scheme for assessing additional awards for violations of specific safety requirements is penal in nature. (Goodyear's Brief pp. 12-13). The implicit assertion of Goodyear's argument is that a penal statute is *ipso facto* regulation. Such an assertion is unsupported by applicable law.

Ohio records no legislative history for either Article II, Section 35 of the Ohio Constitution, which establishes the basis for Ohio's safety requirements, or the statutes promulgated thereunder. Thus, to determine the true nature of this legislation, it is appropriate to review the language of the Constitution and statutes, in conjunction with Ohio case law and the practical effects of the system as it operates.

Turning first to the state constitutional provision which establishes the VSSR system, the intent of those involved in the 1912 constitutional convention which created the Ohio workers' compensation scheme is expressed in the first line of Article II, Section 35, which reads:

> *For the purpose of providing compensation to workmen* and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed... (Emphasis added).

This language was left intact when the constitutional scheme was amended in 1923 to provide for VSSR awards. The pertinent language added by the 1923 amendment is as follows:

> Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees, enacted by the general assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty or less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and *paid in like manner as other awards;* and, if *such compensation* is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution. (Emphasis added).

Ohio Constitution, Art. II, §35.

The plain language of the Ohio Constitution speaks only of compensation. Whatever additional effects the operation of Ohio's workers' compensation scheme may have, it is clear

the primary goal of the entire, unified scheme is to provide compensation to the injured worker in Ohio.

The Ohio Legislature, in delineating the Ohio Industrial Commission's duties under this constitutional scheme, has provided, in pertinent part:

> The industrial commission shall:
>
> (A) Investigate, ascertain, and declare and prescribe what hours of labor, safety devices, safeguards, or other means or methods of protection are best adapted to render the employees of every employment and place of employment and frequenters of every place of employment safe, and to protect their welfare as required by law or lawful orders, and establish and maintain museums of safety and hygiene in which shall be exhibited safety devices, safeguards, and other means and methods for the protection of life, health, safety, and welfare of employees;
>
> (B) Ascertain and fix such reasonable standards and prescribe, modify, and enforce such reasonable orders for the adoption of safety devices, safeguards, and other means or methods of protection to be as nearly uniform as possible as may be necessary to carry out all laws and lawful orders relative to the protection of the lite, health, safety, and welfare of employees in employments and places of employment or frequenters of places of employment;
>
> (C) Ascertain, fix and order such reasonable standards for the construction, repair, and maintenance of places of employment as shall render them safe;

Ohio Rev. Code §4121.13. Additionally, the Commission is required, "to determine claims for additional awards under Section 35 of Article II of the Ohio Constitution..." *Ohio Rev.*

Code 4121.131. Beyond these provisions there is no language in either of these statutes expanding upon the statements of purpose contained in the Ohio Constitution.

The Ohio Supreme Court has consistently ruled that the primary, if not sole purpose of the additional award for violation of specific safety requirements, is compensatory rather than punitive or penal in nature. The case of *State, ex rel. Engle v. Industrial Commission,* 142 Ohio St. 425, 431, 52 NE 2d 743 (1944), contains an historical review of the development of the Ohio workers' compensation scheme. The Court summarized the advantages of the new system to the parties:

> Thereafter the courts were without jurisdiction to entertain an action for damages for death, personal injury or occupational disease brought by or on behalf of a workman against his complying employer. That result was deemed to be advantageous to both workman and employer. The employer could not be subjected to an action which might result in his being compelled to pay both compensatory and punitive damages, and the workman (or in case of death his legal representative) was relieved from electing at his peril either to prosecute an action or apply for compensation. The net result was that for every injury sustained in the course of and arising out of the employment the workman was entitled to compensation, regardless of whether the injury was caused by unavoidable accident, by his own negligence, the negligence of a fellow workman, or the failure of his employer to comply with a lawful requirement. The only exception was an injury which was purposely self-inflicted.
>
> We deem it important that in original Section 35, Article II, the purpose was stated thus: 'For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease...', and although Section 35, Article II, was amended generally in 1923 the above quoted lan-

guage is still found intact in the amendment.

> In our opinion the fact that the purpose clause remained unchanged indicates a clear legislative intent to provide compensation only, regardless of how the injury occurred.

In its interpretation of the law, therefore, the Ohio Supreme Court recognized the expression of legislative intent compelled by the language of the Ohio Constitution. The *Engle* Court, referring to its previous rulings, rejected the contention that the additional award for violation of specific safety requirements was in the nature of damages or penalty:

> In *Austin Co. v. Brown,* 121 Ohio St. 271, at page 277, 167 N.E. 874 (1929), in considering the workmen's compensation law this court used this language:
>
> 'It is neither charity, nor pension, nor indemnity, nor insurance, nor wages, though, if a definition of each and all of these terms were placed in parallel columns with a definition of compensation, certain elements would be found common to all. The term 'compensation' has no striking similarity to any of them except the term 'wages'***.'
>
> To this language could be added that compensation is neither damages nor penalty.
>
> In *Slatmeyer v. Industrial Commission,* 115 Ohio St. 654, at page 658, 155 N. E. 484 (1926), the court, in discussing the constitutionality of Section 35, Article II, uses this language:
>
> 'The imposition of the added 50 per cent is an award just as much as is the original award.'

State, ex rel. Engle v. Industrial Commission, 142 Ohio St. at 437-438. The Court found that the 50 percent additional award served as "full compensation," not as an "additional sum as

damages or penalty" and opined that neither the framers or adopters of the constitutional amendment, nor the General Assembly, had intended to assess the additional award as damages or penalty. *Id.*

Four years after *Engle*, the Ohio Supreme Court was compelled to expand its analysis and reconcile its unequivocal recognition of VSSR awards as compensatory with the implicit penal nature of such awards. In *State, ex rel. Emmich v. Industrial Commission,* 148 Ohio St. 658, 668, 76 N.E. 2d 710 (1947) the Court first explained specifically that the additional award is considered compensation with respect to the workers' compensation claimant. The court stated:

> However, while the additional award is compensation it has another characteristic. It is compensation so far as the injured employee is concerned. It is awarded to him because he has been compelled by law to forego an action against his employer for injuries resulting from failure of the employer to comply with a specific safety requirement, and, therefore, he receives the added compensation of additional award along with the ordinary award.

The Court continued:

> The additional award serves another great objective. The state is concerned for the safety of its citizens, and specific requirements with reference to working conditions are enacted for the purpose of protecting workmen from injury, disease and death. This protection is not only of great value to the workman but is to the great economic advantage of the community and state. The imposition of an additional award acts as a deterrent to every employer from omitting compliance with legal specific safety requirements, and, in that respect, the additional award becomes compensation in the nature of a penalty.

> In the case of *State, ex rel. Whitman v. Industrial Commission*, 131 Ohio St. 375, 3 N.E. (2d) 52 (1936), Judge Jones said at page 379:
>
> 'The additional award is in the nature of a penalty, and it was the purpose of the Constitution to impose such penalty upon the employer who failed to comply, and not upon him who did comply.'

Emmich at 669. The Court resolved the apparent conflict by characterizing the additional award as purely compensatory to the claimant, but of a penal nature to the employer. *Id.*

The Ohio Supreme Court continues to recognize the dual nature of these awards. *State, ex rel. Kroger Co. v. Industrial Commission*, 62 Ohio St. 2d 4, 402 N.E. 2d 528 (1980). They have left no doubt, however, concerning the primacy of the goal of compensation to the claimant. In *State, ex rel. Bailey v. Krise*, 18 Ohio St. 2d 191, 197-198, 249 N.E. 2d 55 (1969), the Court again summarized the case law respecting this issue and went on to note:

> Pertinent to this inquiry are the words of Judge Cardozo, uttered in a conflict-of-law case involving a statute which was penal in one sense and compensatory in another:
>
> '...[T]he question is not whether the statute is penal within the rules of private international law. A statute penal in that sense is one that awards a penalty to the state, or to a public officer in its behalf, or to a member of the public, suing in the interest of the whole community to redress a public wrong...The purpose must be, not reparation to one aggrieved, but vindication of the public justice. *Loucks v. Standard Oil Co.*, (224 N.Y. 99, 102).'
>
> We conclude that the primary characteristic of Ohio's additional award for a violation of a specific safety requirement is compensatory, not penal.

With respect to the effect of Ohio's specific safety requirements, Goodyear makes sweeping reference to the "effect of altering and controlling employer behavior in a number of areas," yet fails to relate any specific example of such effect, either actual or hypothetical. In the absence of any reference by Goodyear to previous VSSR awards made to its employees, coupled with Goodyear's express rejection of the propriety of such awards, it is safe to infer that this is the first such award requested by an employee in the course of Goodyear's operation. Goodyear does not allege the Industrial Commission of Ohio has attempted to investigate or impose a fine against it, or exert any other form of overt control normally associated with regulation. This Court has recognized the mere possibility of a future hinderance to operations may be insufficient to create a concrete dispute. *see, e.g., Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 336-37 (1973). Indeed, the Industrial Commission does not *sua sponte* conduct inspections or unilaterally impose penalties or control on any employer in the course of considering VSSR awards. *Ohio Rev. Code Ann.* §4121.35(B)(4); *Ohio Admin. Code* §§4121-3-20 and 4123-3-20; Young, *Ohio Workman's Compensation Law*, §19.7 (2d ed. 1971). The award is made, as it was here, upon the application of the claimant, not the state.

Penal statutes, in general, are those which impose punishment for an offense committed against the state. *Huntington v. Attril*, 146 U.S. 657, 667 (1892). In contrast, a remedial statute is one which reforms or extends existing rights to individuals for the purpose of promoting justice and advancing the public welfare. *Winfree v. Northern P.R. Co.*, 173 F. 65, 66 (9th Cir. 1909) aff'd 227 U.S. 296 (1913); *Spiller v. Atchison, T. & S.F.R. Co.*, 253 U.S. 117, 135 (1920). Although the same statute may be both penal and remedial in nature, a statute specifying that the penalty payable by its terms is to be paid to the party aggrieved, and not to the state, has been regarded as remedial. *Huntington*, at 667-669, 677.

Goodyear stresses the mandatory minimum percentage of compensation which is additionally awarded as distinguishing VSSR awards from general tort law remedies. Ohio's con-

stitutional provision also sets a maximum limit on amounts which can be assessed against a noncomplying employer. *Ohio Const.* Art. II §35. Rather than supporting Goodyear's argument, this limitation and linkage of VSSR awards to the maximum compensation award for the claimant stresses the compensatory nature of the additional award. A truly penal assessment would bear no relation at all to the level of, or existence of, an injury to a worker. *Tasner v. U.S. Industries, Inc.*, 379 F.Supp. 803, 808 (N.C. Ill. 1974).

Ohio's provision for additional awards for violations of specific safety standards clearly is primarily compensatory and remedial, not penal, in wording, historical interpretation, and effect.

B. Ohio's Specific Safety Requirements Are Applied To Peripheral Matters Which Are Left To State Control.

Goodyear cites *International Paper Co. v. Ouellette*, ___ U.S. ___, 107 S. Ct. 805, 815 n. 19 (1987) for the proposition that the effect, rather than the purpose, of a state's action governs Supremacy Clause analysis. (Goodyear's Brief, p. 14). In *Ouellette*, a landowner in a non-source state filed a lawsuit against a corporation from an adjoining state based on his state's common law nuisance rights. The corporation's operations were regulated by the Federal Clean Water Act. The Court found the application of nebulous and unpredictable standards, through litigation in several states potentially affected by the corporation's discharge, would frustrate the carefully prescribed federal regulatory system by forcing the corporation to attempt to satisfy an "indeterminate number of potential regulations," *International Paper Co. v. Oullette*, 107 S.Ct. 805 at 815 (1987). The analysis in *Oullette*, however, is not applicable.

Ohio is the only state of operation and, as Goodyear concedes, the state requirements are by law, very specific and detailed. Not only does Goodyear fail to demonstrate any burden in the form of unpredictability, but it has failed to explain how Ohio's uniform requirements regarding scaffold-

ing frustrate the full goals and objectives of Congress.In contrast, the regulated entities in the cases cited by Goodyear (*Oullette, Id., Perez v. Campbell*, 402 U.S. 637 (1971), and *San Diego Building Trades Counsel v. Garmon*, 359 U.S. 236, (1959)) were all able to direct the Court's attention to potential or actual interference with conduct clearly touching the central and plainly expressed aim of the federal regulation involved. The *Garmon* Court plainly distinguished such direct conflict from state control of peripheral matters:

> When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard to the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958). Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

Garmon at 243-244.

More recently, the Court, in *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238 (1984), was presented with the same argument that Goodyear makes here, but the Court in addressing the Atomic Energy Act found no more than a "regulatory consequence" attached to the state action involved. The Court noted:

> In sum, it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-

law remedies, *in whatever form they might take*, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or *strict liability* is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept. (emphasis added).

Id. at 256. The specific regulatory effect, therefore, of Ohio's safety requirements which touch on only peripheral matters in the AEA, distinguishes this case from those cited by Goodyear. Certainly, the regulatory effect of Ohio's law is to be tolerated under the Atomic Energy Act.

C. Ohio's Workers' Compensation System Is Intended To Replace Traditional Tort Remedies For Workers Injured In The Course Of Employment.

There is no dispute that the current scheme of VSSR awards instituted by amendment to the Ohio Constitution in 1923, is a direct substitution for the tort action at common law which was previously available to employees. *State, ex rel. Bailey v. Krise*, 18 Ohio St. 2d 191, 195-197, 249 N.E. 2d 55 (1969); *State, ex rel. Rudd v. Industrial Commission*, 116 Ohio St. 67, 71-72, 156 N.E. 2d 107 (1927). Goodyear agrees with this characterization of the system's genesis, but denies it can be analogized to the previous traditional tort remedy. (Goodyear Brief pp. 17-18).

Goodyear makes no significant distinction between Ohio's system and the tort action it replaces. The fact that the statute implies strict liability applies to VSSR actions does not distinguish this law from the broad variety of remaining state common law actions utilizing the same standard. Indeed, the report of the Joint Committee on Atomic Energy on Proposed Amendments to Price-Anderson Act Relating to Waiver of Defenses, S. Rep. No. 1605, 89th Cong., 2d Sess. 9, 11-12 *reprinted at* (1966) U.S. Code Cong. & Admin. News 3212, includes this statement:

> Absent such a determination [that a nuclear incident is an 'extraordinary nuclear occurrance'], a claimant would have exactly the same rights that he has today under existing law -- including, perhaps, benefit of a rule of strict liability if applicable state law so provides. Thus, this bill in no way provides for deprivation of a claimant's existing rights.

If the Committee anticipated the acceptance of tort claims under the standards of strict liability in cases involving nuclear hazard, it surely expressed no objection to the utilization of that standard in the case of tort claims for ordinary safety matters, or for their statutory substitutions.

Additionally, Goodyear fails to explain its contention that administrative determination of liability or limitation on damage awards creates any meaningful difference in principle between the current Ohio system and previous tort actions. Even though the initial determination regarding an award is made administratively, the parties are free to request reconsideration of the decision and pursue the often employed mandamus action. Ohio Rev. Code Chapter 2731.

In *Silkwood*, upon consideration of the Atomic Energy Act, this Court sanctioned the imposition of an award similar to the VSSR award herein, and Goodyear's attempts to distinguish that case are inconsequential. Insofar as the VSSR award is penal in its effect on violating employers, it is directly analogous to the award in *Silkwood*. There, the Court found a

regulatory "consequence" of the punitive damages awarded pursuant to Oklahoma statute. *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238 at 256 (1984). In the same manner, it may be that the VSSR award has some regulatory consequences on Goodyear's conduct, but it is neither the primary consequence of the scheme, nor does it involve the intrusive state entanglement that Goodyear alleges. Like the traditional remedy of punitive damages in *Silkwood*, it is a long-established forum for relief which is accepted as a cost of doing business in Ohio. Based on the foregoing, Ohio's system of additional awards for violations of specific safety requirements is not "regulation" for purposes of Supremacy Clause analysis.

II. Goodyear Atomic Corporation, As a Federal Contractor, Is Not Constitutionally Immune From Application Of Ohio's Specific Safety Requirements.

A. Congress Has Clearly and Unambiguously Provided That State Workers' Compensation Laws Apply To Federal Facilities.

In 1936, Congress enacted legislation with the announced purpose of:

> ... provid[ing] more adequate protection to workmen and laborers on projects, buildings, constructions, improvements, and property wherever situated, belonging to the United States of America, by granting to the several states jurisdiction and authority to enter upon and enforce their workmen's compensation laws on all property and premises belonging to the United States of America ...

49 Stat. 1938, 1939; current version at 40 U.S.C. §290.[2]

[2]The reason for enacting this bill was "... to fill a conspicuous gap in the workmen's compensation field by furnishing protections against death or disability to laborers and mechanics on Federal projects ..." *S.Rep.* No. 2294, 74th Cong. 2d Sess. (1936).

There can be no doubt that this protection is as necessary now as it was in 1936. Section 290 of Title 40 reads as follows:

> Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State, and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.
>
> For the purposes set out in this section, the United States of America vest in several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are affected, the right, power, and authority aforesaid: Provided, however, That by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated: Provided further, That nothing in this section shall be construed to modify or amend subchapter I of chapter 81 of Title 5.[3]

[3]Subchapter I of Chapter 81 of Title 5 relates to compensation for work injuries to federal employees.

This legislation was enacted to provide state workers' compensation coverage to employees of federal contractors and it vests the states with the authority to apply compensation coverage to federal facilities "in the same way and to the same extent" it would apply to any other employer in the state. Thus, the statute is plainly applicable to the instant case.

Goodyear's interpretation of this statute (excluding VSSR awards from Ohio's law) would result in only partial workers' compensation protection to the Ohio workers at its Portsmouth plant. Section 290 plainly provides that Ohio's workers' compensation laws apply, in their entirety, to federal facilities. At the time Congress enacted Section 290, Ohio's specific safety rules already were an integral part of Ohio's workers' compensation laws.[4] Had Congress intended to exclude the safety rules from the coverage of Section 290, a specific exclusion of those requirements would be evidenced in the statutory language. As stated by the Ohio Supreme Court in the case below:

> The instant case involves an injury to a worker because of an allegedly defective scaffold. It could not have been the intent of Congress to allow the State of Ohio to protect every worker who uses a scaffold, except those workers who use scaffolds at atomic energy plants. (JA-7)

Goodyear is a private employer contracting with the Federal Government to operate the Portsmouth Gaseous Diffusion Plant. Goodyear obviously derives commercial benefit from this association. This federal contract, however, cannot be employed to shield Goodyear from its obligation to comply fully with Ohio's workers' compensation laws. In fact, Goodyear does not dispute it is, and has been, subject to Ohio's workers' compensation laws for a number of years. Under

[4]In 1936, when Section 290 was enacted, Ohio and six other states had workers' compensation laws which included safety provisions. A. Larson, *The Law of Workmen's Compensation*, §69.10, at 13-107, 13-111 (1982).

Ohio's laws, Goodyear participates in the benefits of the state insurance fund.[5] Thus, through the workers' compensation system, Goodyear is protected from negligence suits by its employees. Ohio Constn. Art. II, §35. As a "state fund" employer, however, Goodyear must comply with a number of duties under the statute. Some of these duties include: paying premiums; submitting reports of industrial injuries (*Ohio Rev. Code Ann.* §4123.28); submitting payroll reports (*Ohio Rev. Code* §4123.26); allowing "on premises" payroll audits (*Ohio Rev. Code* §4123.23) as well as safety investigations. (*Ohio Rev. Code* §§4121.14 and 4121.17).

Goodyear acknowledges the applicability of Ohio's workers' compensation laws to the Portsmouth plant. Having contracted with the State of Ohio for insurance for payment of workers' compensation claims of its employees, Goodyear cannot be permitted to pick and choose which statutory protections its workers will enjoy. The Federal Government, through Section 290, and Ohio, in its Constitution, have already determined that the full protection of the law applies.

As previously noted, VSSR awards are an integral part of the overall workers' compensation scheme in Ohio. *State ex rel. Kroger Co. v. Industrial Commissior*, 62 Ohio St. 2d 4, 402 N.E. 2d 528 (1980). These additional awards serve as a compensatory supplement in lieu of the common law remedy for punitive damages. The Southern District Court of Ohio, in the case of *Industrial Fabricators, Inc. v. The Ind. Comm. of Ohio*, (JA-109) stated:

> The history of Ohio's additional award provision indicates that it was meant to fully serve the purpose

[5]Under Ohio's laws, employers can participate in the state insurance fund by paying premiums. Then, when workers compensation claims are recognized, the worker's benefits are paid from the state insurance fund. Ohio Rev. Code §4123.35(A). Employers can alternatively qualify for self-insured status. Self-insured employers pay allowed workers' compensation benefits from their own funds. Ohio Rev. Code §4123.35(B).

of compensation and also to supplant the employee's common law rights, pursuant to which he was entitled to seek punitive damages for gross or willful wrongdoing on the part of the employer.

Ohio's specific safety requirements are inextricably entwined in the entire workers' compensation system. These awards, and the theme of safety in the workplace, are mentioned throughout the workers' compensation law of Ohio. In *Ohio Rev. Code* §4121.131, a listed additional duty of the industrial commission is to "... determine claims for additional award under Section 35 of Article II of the Ohio Constitution ...". Section 4121.37 provides for a "Bureau for the prevention of industrial accidents and diseases." Prevention is as much a theme in the statute as is compensation. Without the ability to enforce its safety rules, there is little the Commission can do to ensure safety in the workplace, thereby protecting the lives of Ohio workers.

Furthermore, the State of Ohio has an economic stake in the enforcement of its safety requirements. An unsafe workplace will necessarily result in increased industrial accidents and costly compensation claims. If a "state fund" employer is exempted from the safety requirements, the result may be an increased drain on the state insurance fund. Additionally, those employers subject to the requirements would be subsidizing the exempt employer. Thus, Ohio's safety program not only prevents injuries and saves lives but it also protects the state insurance fund as well. The state safety requirements, therefore, cannot be surgically extracted from Ohio's workers' compensation scheme.

Goodyear argues the legislative history of Section 290 is indicative of Congress' intent to exclude Ohio's safety requirements from the operation of the Act. The deletion of "safety" and "insurance" language from the final version of the bill, Goodyear argues, proves Congress' intent that the safety provisions of the state workers' compensation laws be held inapplicable to federal facilities. However, Goodyear specifically accepts application of the "insurance" provisions of the state

workers' compensation laws, such as payment for medical bills and disability, a position clearly incompatible with their argument. It is more logical, moreover, to conclude the safety regulations the Senate deleted from the bill were state safety codes addressing general safety matters such as fire and building safety codes.[6] This is particularly true in light of the statute's specific language that state workers' compensation laws apply to federal facilities "to the same extent" they would apply to any other employer in the state. Thus, the Ohio workers' compensation law must apply in its entirety to the Goodyear facility.

B. Congress Evidenced a Clear And Unambiguous Intent To Apply State Workers' Compensation Laws To Contractor-Operated Federal Facilities.

Goodyear, as a contractor with a federal facility, argues it is immune from state safety requirements. Goodyear makes this argument while admitting it is subject to Ohio's workers' compensation laws with all the accompanying requirements but claims immunity from that portion of the law requiring employers to maintain a safe working environment for its employees. Such a position is inconsistent at best.

Goodyear relies upon the case of *Hancock v. Train*, 426 U.S. 167 (1976)[7], to support its contention that it is immune from state regulation. In that case, this Court examined Section 118 of the Clean Air Act (42 U.S.C. §1857 et seq.) and found no statutory language requiring federal installations to submit to the extensive degree of regulation required to obtain state permits. The rationale in *Hancock* is inapplicable to the instant case because Congress has affirmatively acted to vest states

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[6]For instance, Title 37 of the Ohio Revised Code involves fire safety regulation and building safety.

[7]Superseded by statute, Pub. L.No. 95-96 Tit. I, §116,91 Stat. 711 (1977) codified as amended at 42 U.S.C. §7418 (Nov. 1977 Supp.)

with the authority to apply state workers' compensation laws to federal facilities. 40 U.S.C. §290, 42 U.S.C. §2021(k). In *Hancock*, this Court held:

> Taken with the 'old and well-known rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without a clear expression or implication to that effect,' this immunity means that where 'Congress does not affirmatively declare its instrumentalities or property subject to regulation,' the federal function must be left free of regulation.

In the area of workers' compensation, however, 40 U.S.C. §290 constitutes an affirmative declaration by Congress that its instrumentalities and property be subject to the workers' compensation laws of the individual states.

As stated in *Hancock* at 180:

> Neither the Supremacy Clause nor the plenary powers clause bar all state regulation which may touch the activities of the Federal Government.

Additionally, even absent 40 U.S.C. §290, Goodyear cannot claim federal immunity as a shield against Ohio's workers' compensation laws. In *United States v. Pennsylvania Environmental Hearing Board*, 584 F.2d 1273 (1978), the court held a private corporation, operating a federal government ammunitions plant, was not shielded by the Federal Water Pollution Control Act from proceedings brought by a state agency seeking civil penalties for violations of state water pollution statutes. The Court addressed both *Hancock* and *E.P.A. v. California*, 426 U.S. 200 (1976):

> Yet whatever their vitality, *Hancock* and *E.P.A.* do not deal with the issue of whether or when a private company becomes converted into a federal agency by virtue of contracting with the Government. *Hancock* and *State Water Resources Control Bd.* held

> only that federal agencies need not procure state air and water pollution control permits. Even those holdings, as indicated, have now been effectively overruled by statute.

U.S. v. Penna. Environ. Hrg. Bd., 584 F.2d at 1280 n.22.

In reaching its decision, the court relied heavily on *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950). *Powell* involved a private munitions manufacturer which had contracted with the federal government to operate a plant owned by the United States. The contractor claimed it was a Government agent and its employees were thereby exempt from the hourly wage provisions of the Fair Labor Standards Act. The *Powell* Court, in holding that the contractor was not an agency of the federal government, opined as follows:

> The relationship of employee and employer between the worker and the contractor appears not only in the express terminology that has been quoted. It appears in the substantial obligation of the respondent-contractors to train their working forces, make job assignments, fix salaries, meet payrolls, *comply with state workmen's compensation laws* and Social Security requirements ... (emphasis added)

Id. at 507.

The *Powell* Court reasoned that in taking advantage of the "genius" of private enterprise, the Federal Government derived benefits, but at the same time concomitant burdens would result to the government. One of those burdens, as noted above, is compliance with state workers' compensation laws.

Goodyear further proposes that even if *Hancock* does not exempt Goodyear from state regulation, the Supremacy Clause dictates that result. (Goodyear's brief p. 30). This Court has held otherwise.

> Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which congressional policy does not require.

Penn Dairies v. Milk Control Comm'n., 318 U.S. 261, 271 (1943). Certainly there is no intention to exclude contractors from state workers' compensation law included in Section 2061 of the Atomic Energy Act as Goodyear claims. Since Congress has not acted to forbid state regulation of federal contractors, it cannot be implied. *Penn Dairies* at 270 (citing *Alabama v. King & Boozer*, 314 U.S. 1 (1941); and *James Stewart and Co. v. Sadrakula*, 309 U.S. 94 (1940).

C. *The Atomic Energy Act Expressly Reserves The Rights Of States To Regulate Non-Radiological Safety Matters At Nuclear Facilities.*

In 1954, Congress enacted legislation which opened the atomic energy field to private industry. 42 U.S.C. §2013(d). The objectives of the Act were twofold: to provide a program to promote the development of a nuclear industry, 42 U.S.C. §§2013(a), 2013(d); and to provide for a program of continued government regulation for the protection of the health and safety of the public. 42 U.S.C. §2013(c). In the Act, the Atomic Energy Commission (AEC) was responsible for both promotion and regulation of the nuclear field. 42 U.S.C. §2132, 2133.[8] The subject of federal-state regulations was addressed in only one section of the 1954 Act. 42 U.S.C. §2018 which specifically retained state authority over the "generation, sale, or transmission of electric power." Id.

In 1959, Congress amended the 1954 Act to allow states to enter into agreements with the AEC to provide for the discontinuance of its regulatory authority with respect to key product materials, source materials, and/or special nuclear materials in quantities not sufficient to form a critical mass. 42 U.S.C. §2021(b).

The 1959 Amendments plainly provide for expansion of the state's role in the regulation of atomic energy. Having taken affirmative action to bring the states into the nuclear regulatory arena, clearly there is no question the states always have had the power to regulate nonradiological issues.[9]

Section 2021 of Title 42 allows for agreements between the AEC (whose duties are now divided between the Nuclear Regulatory Commission and the Department of Energy) and the individual states which would permit the states to regulate certain nuclear materials and facilities, and the radiation hazards associated therewith.

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[8]The dual functions of the AEC were separated in 1974 by the creation of two separate agencies, the Nuclear Regulatory Commission (NRC) and the Energy Research and Development Administration (ERDA). Energy Reorganization Act of 1974, Pub.L. No. 93-438, 88 Stat. 1233 (codified at 42 U.S.C. §§5801-5891 (1976)). ERDA's functions were subsequently transferred to the Department of Energy. Department of Energy Reorganization Act of 1977, Pub.L. No. 95-91, 91 Stat. 577 (codified at 42 U.S.C. §§7151-7352, 7172 (1978)).

[9]Most litigation involving the question of state regulation of nuclear facilities concerns the issue of whether the state regulation is an attempt to regulate radiation hazards. No such confusion exists here. Ohio's safety requirements deal only with occupational safety and in no way touch upon radiation hazards.

However, Section 2021 does not deal solely with these special agreements. The section attempts to delineate more clearly the responsibilities of the federal and state governments, respectively. In subsection (c) the scope of these special agreements is limited by requiring the AEC to retain the authority to regulate nuclear production facilities.

Subsections (b) and (c) express congressional intent regarding regulation of radiological concerns. In subsection (k), Congress indicates its intent regarding regulation of non-radiological areas, and that regulatory arena is specifically left open to the states. Congress stated precisely and clearly in subsection (k):

> Nothing in this section shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards.

This language plainly and unambiguously manifests the intent of Congress that the Atomic Energy Act not preempt state regulation of non-radiological hazards.

The legislative history accompanying the AEA refines and verifies this interpretation of 42 U.S.C. §2021(k).

> This subsection is intended to make it clear that the bill does not impair the state authority to regulate activities of AEC licensees for the manifold health, safety, and economic purposes other than radiation protection. As indicated elsewhere,the Commission has exclusive authority to regulate for protection against radiation hazards ...

S. Rep. No. 870, 86 Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2882-83. As stated in the statute, "nothing" provided in 42 U.S.C. §2021 limits the power states have always held to regulate nuclear facilities for non-radiological matters. Subsection (c) only means there can be no state regulation of radiological hazards at production and utilization facilities.

The comments of the Joint Committee on Atomic Energy, interpreting subsection (b), support this interpretation. "[T]he intent is to have the material regulated and licensed either by the Commission, or by the state and local governments, but not by both." S.Rep. No. 870, 86th Cong. 1st Sess. 4, 8 *reprinted in* 1959 U.S. Code Cong. & Ad News 2879. The language of subsection (k) in conjunction with the legislative history accompanying 42 U.S.C. §2021 could not be any clearer in reserving the states' rights to regulate non-radiological concerns at nuclear facilities.

Goodyear provides no support for its argument that subsection (k) does not apply to private contractors who operate federal facilities. Having reserved the rights of the states to regulate non-radiological concerns at nuclear facilities, it cannot be presumed that Congress intended to allow private commercial contractors to escape all regulation in non-radiological areas. Granted, 42 U.S.C. §2061 (b)(2)(C) requires federal contractors to abide by federal safety regulations, but that language cannot be so broadly interpreted as to allow wholesale exclusion of state regulation of federal contractors. See *Penn Dairies Inc. v. Penn. Milk Control Comm'n*, 318 U.S. 261 (1943); *Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963).

Furthermore, in cases interpreting subsection (k), the relative jurisdictions of the federal and state governments are clarified. In *Pacific Legal Found. v. State Energy Resources*, 659 F.2d 903 (9th Cir. 1981) *aff'd.*, 461 U.S. 190 (1983), California laws regulating all electric plants in California resulted in a moratorium on the construction of new nuclear plants. The Court held:

> ... [t]hat the Atomic Energy Act does not preempt state laws enacted for purposes other than protection against radiation hazards. Because the moratorium provision and the three-site requirement were enacted for purposes other than protection against radiation hazards, we conclude that they are not preempted.

The Court held the preemptive effect of subsection (c) to be quite narrow when read in conjunction with Section 2018 and subsection (k):

> Congressional intent with respect to section 274 [42 U.S.C. §2021] is nearly as clear. Both the hearings on section 274 and the report of the Joint Committee on Atomic Energy demonstrate Congress' intent to assert exclusive federal control over the radiation hazards associated with nuclear materials. Limited regulatory authority may be turned over to the states pursuant to Section 274(b), but Section 274(c) requires the NRC to retain full regulatory control over matters concerning radiation hazards. (citations omitted). However, we find no indication in section 274 or elsewhere in the Atomic Energy Act of 1954 that Congress intended to preempt any state regulation other than that involving radiation hazards. On the contrary, section 274(k) specifically allows the states to regulate 'for purposes other than protection against radiation hazards.' The committee report explains that '[t]his subsection is intended to make it clear that the bill does not impair the State authority to regulate activities of the AEC licensees for the manifold health, safety, and economic purposes other than radiation protection.' S.Rep. No. 870, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2872, 2882. Although section 274(c) gives the NRC sole authority to regulate 'the construction and operation of [nuclear power plants],' the specific non-preemption language contained in sections 271 [2018] and 274(k) must control the general language of section 274(c). We therefore conclude that Congress intended to preempt only state regulation of radiation hazards associated with nuclear power, and not state regulation for other purposes.

Id. Another circuit court likewise concluded the Atomic Energy Act ousted the states only from the area of radiological

regulation. *Northern States Power Co. v. Minnesota,* 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.,* 405 U.S. 1035 (1972), involved a Minnesota law regulating the allowable level of radioactive discharges from nuclear plants. The Minnesota standards were more restrictive than were the federal standards. The Court, in holding the AEC possessed sole authority to regulate radiation hazards, discussed the effect of subsection (k). The Court said:

> The only logically acceptable reason for inclusion of subsection (k) within [section 274] was to make it clear that Congress was not, by subsection (c) of the 1959 amendment, in any way further limiting the power of the states to regulate activities, other than radiation hazards, associated with those areas over which the AEC was forbidden by that subsection to relinquish its control.

Northern States v. Minn. at 1150. See also *United States v. City of New York,* 463 F.Supp. 604 (S.D.N.Y. 1978).

Nor is Section 2021(k) solely applicable to AEC licensees as Goodyear contends. Nothing in the Atomic Energy Act indicates Congress intended that private contractors at federal facilities should escape all state regulation as provided for in subsection (k). While subsection (c) provides exclusive federal regulation for radiation hazards at production and utilization facilities, the language of subsection (k) plainly overrides that of subsection (c).

D. Federal Policies Are Not Obstructed By The Application of Ohio's Workers' Compensation Laws To Goodyear's Activities At The Portsmouth Plant.

In addition to the specific intentions expressed by Congress and discussed earlier, the above-cited cases provide the States may regulate the activities of private contractors such as Goodyear Atomic. Such state regulation is permissible even if it imposes some burdens on the Federal Government. *Penn Dairies v. Pa. Milk Control Comm'n,* 318 U.S. 261, 275 (1943).

In that case, this Court held minimum price regulations contained in the Pennsylvania Milk Control Law were applicable to the sale of milk by a private dealer to the United States. This decision recognized the states' right to regulate their affairs and that the burdens which result are likely to be passed on to the Federal Government.

> The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders. And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system (citations omitted).

Id. Goodyear does nothing more than make empty assertions that applications of Ohio's safety rules will impede operations at the Goodyear Plant. Since the state's regulations apply only to non-radiological hazards, it is difficult to understand how maintaining a safe working environment can impede the Congressional purposes under the AEA. 42 U.S.C. §2011.

Nor is the burden alleged by Goodyear of a greater degree than that to which it has previously submitted by way of complying with Ohio's workers' compensation laws. The specific safety rules here in question are just one more aspect of the workers' compensation law with which all Ohio employers

must abide. These rules facilitate the creation of a safe working environment for all of Ohio's workers. It is in the best interests of the state as well as the employers and workers to avoid work-related injuries and diseases.

Additionally, Goodyear notes that the Department of Energy, through DOE orders, has applied OSHA's safety regulations to its plant operations. If Goodyear is not burdened by OSHA's voluminous regulations, it is difficult to understand how Ohio's safety rules could impose any further operational burden. The police power of the State to regulate health and safety matters is not so easily thwarted. Moreover, Goodyear's operational duties would not be burdened to any greater degree by dual compliance with the safety rules than would any other employer doing business in the State of Ohio. There is no compelling reason provided by Goodyear warranting special treatment to this private contractor. In order to completely oust the state safety laws, it is not enough that application of these safety rules cause an administrative inconvenience to Goodyear. It must interfere with Congress' purpose under the AEA and no such showing has been made. Furthermore, even if the State and Federal provisions somehow do overlap, this Court has held the proper approach to such a situation would be to reconcile the operation of the statutory schemes rather than discarding one. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973). This is particularly true when considering a state's exercise of its police powers. *California v. Zook*, 336 U.S. 725, (1949).

Finally Goodyear contends national security considerations weigh in favor of rejecting application of the state safety rules. It is difficult to understand how compliance with the safety rules will result in a greater frustration of federal interests than the compliance with the remainder of the Ohio workers' compensation law. Further, it must be kept in mind that national security interests were most certainly a concern when 40 U.S.C. 290 was enacted. However, no national security interest exception was enunciated in that law.

In determining whether Ohio's safety requirements apply to the Goodyear facility, it is clear all requirements of *Hancock* are satisfied. Federal law integrates state workers' compensation laws with respect to federal facilities. Section 290 of Title 40 expressly incorporates the substantive provisions of the states' workers' compensation laws and vests the states with the authority to enforce those laws on all the lands and premises owned or held by the United States. The Atomic Energy Act similarly expressly provides for State regulation of non-radiological hazards at federal facilities. 42 U.S.C. §2021(k). It would be difficult to find a more unambiguous Congressional intent to apply Ohio's safety requirements to the Goodyear facility.

III. Ohio's Specific Safety Requirements Are Not Pre-empted By The Atomic Energy Act.

The doctrine of preemption has evolved from the Supremacy Clause which declares the Constitution and the laws of the United States "... shall be the supreme law of the land." U.S. Const., Art. VI. The Constitution also provides "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to tne States, are reserved to the States respectively, or to the people. U.S. Const., Amend. X.

Preemption of state statutes can occur in various ways. Congress may expressly exempt state action or an actual conflict between federal and state law may render the state law a nullity. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Florida Lime and Avacado Growers Inc. v. Paul*, 373 U.S. 132 (1963). Congressional intent to preempt may be either express or implied. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 233-234 (1947); *Bethlehem Steel Co. v. N.Y. Labor Rel. Bd.*, 330 U.S. 767 (1947). In any preemption question, however, where Congress has "legislated in a field which the States have traditionally occupied ... we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Sante Fe Elevator Co.*, 331 U.S. at 230.

State laws may be preempted by federal regulations as well as by federal statutes. *Hillsborough County v. Automated Medical Labs Inc.* 471 U.S. 707, 713 (1985). Preemption, however, will not be inferred merely from the comprehensive nature of federal regulations. *N.Y. Dept. of Social Services v. Dublino*, 413 U.S. 405, 415 (1973). Finally, courts "are even more reluctant to infer preemption from the comprehensiveness of regulations than from the comprehensiveness of statutes." *Hillsborough County v. Automated Medical Labs, Inc.* 471 U.S. at 717.

A. *To Supercede A State's Police Power, A Clear And Manifest Intent Must Be Present.*

This Court has held, "It will not be presumed that a federal statute was intended to supercede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952). When a state, through its laws and regulations is exercising a traditional police power,

> the intent to supercede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state.

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960), (citing *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

To determine whether Congress meant a federal law to displace state law in an area traditionally dominated by state regulation, courts must "start with the assumption that the historical police powers of the states were not to be superceded by the Federal act unless that was the clear and manifest purpose of Congress." *Hillsborough County v. Automated Medical Labs*, 471 U.S. at 717, (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

Certainly protection of the health and safety of residents is an area historically regulated by the states, *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 428-29 (1963); and the Court has been "most reluctant to invalidate such regulations." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981). In fact, this Court has specifically held that states possess "broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor Laws, minimum and other wage laws, *laws affecting occupational health and safety*, and workmen's compensation laws are only a few examples." *DeCanas v. Bica*, 424 U.S. 351, 356 (1976) (emphasis added). Since Ohio's specific safety requirements fall squarely within the parameters of the exercise of traditional police powers, only if the AEA evidences a "clear and manifest" purpose to preempt will Ohio's non-radiological safety laws be considered inapplicable to private contractors operating federal nuclear facilities.

Goodyear argues the state safety requirements here are superceded by the AEA under two preemption theories. First, Goodyear contends the AEA and regulations promulgated pursuant to that Act show an express intent to preempt Ohio's safety requirements. Additionally, Goodyear argues the Ohio requirements stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. Neither argument prevails since there is no clear and manifest purpose that Congress intended the Atomic Energy Act to bar the application of state safety requirements to facilities regulated under the Act.

B. Neither The Atomic Energy Act Nor The Regulations Promulgated Thereto Evidence A Congressional Intention To Preempt State Safety Requirements.

In determining whether federal law preempts state law, "[t]he purpose of Congress is the ultimate touchstone." *Retail Clerks Intern. Ass'n., Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963). An examination of the AEA, its legislative history, and the regulatory scheme reveals no "clear and manifest"

purpose on the part of congress to preclude application of the states' occupational safety requirements to Goodyear.

The Atomic Energy Act established the Atomic Energy Commission (AEC) and provided it exclusive ownership of all fissionable materials and related facilities. In 1954, the Act was amended to allow private industry to participate in the development and utilization of atomic energy for "peaceful purposes". The Act's stated policy was to:

> encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public.

42 U.S.C. §2013(d). At this time, the AEC was given rulemaking authority to regulate atomic energy "to promote the common defense and security or to protect health or to minimize danger to life or property" 42 U.S.C.2201(b).

As noted above, in 1959 Congress amended the Atomic Energy Act in order to "clarify the respective responsibilities ... of the States and the Commission with respect to the regulation of key product, source, and special nuclear materials." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 250 (1984)(quoting 42 U.S.C. §2021(a)(1) and *S.Rep.* No. 870, 86th Cong., 1st Sess., 8-12, *reprinted in* 1959 U.S. Code Cong. & Admin. News 2872). The Joint Committee language specifically provides the AEC retained such control to protect the public health and safety *from radiation hazards* (emphasis added) *Id.* at 2878. Under the 1959 amendments the AEC retained exclusive regulatory authority over:

> areas which, because of their special hazards, or for reasons of Federal responsibility, are believed desirable for continued responsibility by the Commission. They include the construction and operation of production or utilization facilities; the disposal into the ocean or sea of such materials; and the

> disposal of such materials as the Commission determines should not be disposed of without a license from the Commission.

Id. at 2881.

In reviewing this legislative history, this Court concluded "Congress ... intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 249 (quoting *Pacific Gas and Electric*, 461 U.S. 190, 205 (1983)). Thus, this Court has held the language of 42 U.S.C. 2021(c) reserves to the Federal government the regulation of only the radiological safety aspects of nuclear facilities.

This case, however, does not involve a question of radiological regulation. This case concerns the application of Ohio's safety regulations concerning scaffolding to a government contractor at a federal nuclear facility. This type of state regulation is most clearly the type reserved to the states on the face of the Atomic Energy Act. The statute provides that nothing in 42 U.S.C. §2021 "shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. §2021(k). The legislative history accompanying the Act clearly defines the relative jurisdictions of the states and the AEC as allowing states to regulate nuclear facilities regarding health and safety as those issues relate to non-radiation issues. *S.Rep.* No. 870, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Admin. News 2882-83.

This dichotomy between radiological and non-radiological safety issues at nuclear facilities has been verified by this Court as well as several circuit courts. In the two most recent cases addressing the issue of preemption under the Atomic Energy Act, this Court held Congress intended that the Federal Government should regulate only the radiological safety aspects involved in the construction and operation of a nuclear plant. *Silkwood v. Kerr McGee Corp.*, 464 U.S. at 249; *Pacific Gas & Electric Co. v. State Energy Consrvn & Dev. Comm'n.*, 461 U.S. at 205.

Further, several circuit courts have recognized exclusive federal control over plant construction and operation as subject to the qualification that states retain the authority to regulate those activities concerning non-radiation issues. *Northern States Power Co. v. Minnesota*, 447 F.2d at 1150. In fact one court, after searching legislative history, held, "we find no indication in section 274 or elsewhere in the Atomic Energy Act of 1954 that Congress intended to preempt any state regulation other than that involving radiation hazards". *Pacific Legal Foundation v. State Energy Resources Consrvn & Dev. Comm'n.*, 659 F.2d 903, (9th Cir. 1981), *aff'd*, 461 U.S. 190 (1983). In the case of *New Hampshire v. Atomic Energy Commission*, 406 F.2d 170 (1st Cir. 1969), *cert. denied*, 395 U.S. 962 (1969), the court stated, "The history of the 1954 legislation reveals that the Congress, in thinking of the public's health and safety, had in mind only the special hazards of radioactivity." *New Hampshire*, 406 F.2d at 174. The court went on to note that the AEC itself had "been consistent in confining itself to these hazards." Id.

Finally, the Ohio Supreme Court has addressed federal authority over radiological hazards at nuclear facilities. *Cleveland v. P.U.C.*, 64 Ohio St. 2d 209, 214 , 414 N.E.2d 718, (1980). This decision, in conjunction with the decision below, indicates Ohio recognizes the joint roles of the State and Federal governments regarding regulation at nuclear facilities.

C. Goodyear's Status As A Federal Contractor Does Not Immunize It From Application Of Ohio's Occupational Safety Requirements.

Goodyear argues that its status as a private contractor at a federally-owned facility removes it from the obligations of 42 U.S.C. §2021(k), and the concommitant obligation to comply with Ohio's safety requirements. Contrary to Goodyear's argument, the AEA does not exempt federal contractors from the obligation to abide by the non-radiological laws of the states.

As explained earlier, Ohio's VSSR awards are monetary awards and constitute a portion of the workers' compensation system. An employer who violates a specific safety requirement will be assessed the cost of such violation. Ohio Const. Art. II §35. The assessment of such cost may be analogized to a tax imposed on employers participating in the state insurance fund. When faced with a situation where a state imposes an economic burden on those who contract with the federal government, the Court has upheld such regulation or taxes as constitutional so long as that tax "is imposed equally on the other similarly situated constituents of the State." *United States v. County of Fresno,* 429 U.S. 452, 462 (1977).

Goodyear cannot claim Ohio's specific safety requirements are not uniformly applied. The statute defines employers as including the state and any person, firm or corporation within the state which employs one or more workers. *Ohio Rev. Code* §4123.01(B). The statute provides that all employers are required to abide by state safety requirements. *Ohio Rev. Code* §4121. To follow Goodyear's reasoning would deprive the Goodyear Atomic employees of protections accorded all other employees in Ohio. (See *State ex rel. Miller v. Industrial Comm'n,* (JA-4)).

Furthermore, this Court upheld the assessment of a contractor's use tax to companies who had contracted with the AEC for work to be performed at the Oak Ridge Gaseous Diffusion Plant in Oak Ridge, Tennessee. In that case, this Court held the companies were not agents or instrumentalities of the Government and thus their separate interests (the use of government-owned lands for company profit) were held to be taxable. *United States v. Boyd,* 378 U.S. 39, 48 (1964). Thus, state taxing power has been held applicable to a facility identical to the Goodyear Atomic Plant. Therefore, Goodyear's argument that it is totally immune from state regulation by virtue of its status under the AEA is simply wrong.

Goodyear attempts to cloak itself in federal immunity by arguing that facilities operating under 42 U.S.C. §2061(b) are meant to be exclusively regulated for all purposes, radiological and non-radiological, by DOE and thus Ohio is preempted from application of its occupational safety requirements. The contractors in *Boyd* were also contractors under this provision, but that did not render them immune from state taxing power. Furthermore, the language of 42 U.S.C. §2061 allows the AEC to contract with persons to operate its facilities and that is the pronounced purpose of this section. *Sen. Rep.* No. 1699, 83rd Cong.; 2nd Sess. *reprinted in* 1954 U.S. Code Cong. & Admin. News 3482. Contractors who operate such facilities must agree to submit to DOE inspections and "comply with all safety and security regulations which may be prescribed by the Commission." 42 U.S.C. §2061(b)(2)(B) and (C). Those provisions, however, do nothing more than establish the terms of the contract. Furthermore, since the scope of the AEA involves radiological safety concerns, it can be implied that this provision requires compliance with radiological safety regulations. There is nothing on the face of this statutory provision or in the legislative history to indicate an intent to exclude governmental contractors from application of state laws in non-radiological areas. And most certainly the language does not provide a "clear and manifest" purpose to override state police powers.

Goodyear continues its argument by stating that the language of 42 U.S.C. §2021(c)(1) specifically excludes production and utilization facilities, like Goodyear's, from state regulation. (Goodyear's brief, p. 39). That argument was dismissed by this Court in *Silkwood.* In *Silkwood* the award of punitive damages against a federally licensed nuclear facility was found to be no hindrance to the AEA's purpose of encouraging widespread participation in development and utilization of atomic energy for peaceful purposes. While Goodyear attempts to distinguish *Silkwood* as relating only to commercial licensees, no such limitation is warranted. At the time Silkwood's lawsuit was filed, Oklahoma had not entered into an agreement with the AEC under 42 U.S.C. §2021. Even if it had, Kerr-McGee still would have been "subject to exclusive NRC safety regulation because it was licensed to possess special nuclear material in a quantity sufficient to form a critical mass. See 42 U.S.C. §2021(b)(4) (1976 ed. and Supp. V)." *Silkwood v. Kerr-McGee Corp.,* 464 U.S. at 250 n. 11. Thus, this

Court understood the Kerr-McGee facility to be under NRC's exclusive regulatory authority and still the punitive damage award was upheld. As this Court stated:

> In sum, it is clear that in enacting the Price-Anderson Act, Congress assumed that state-law remedies *in whatever form they may take,* were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. (emphasis added).

Silkwood, at 256.

It would be incongruous to recognize the State's ability to impose "state-law remedies in whatever form they take" when employees are injured by nuclear accidents and then hold that a worker injured in a non-radiological accident at a nuclear facility does not have the applicable state remedies available. Goodyear, therefore, cannot escape application of Ohio's safety requirements by virtue of its federal contractor status or by its misplaced reliance on the statutory language of 42 U.S.C. §2061 and §2021(c).

D. Ohio's Specific Safety Requirements Are Not Pre-empted By DOE's Regulatory Scheme.

Goodyear argues the comprehensive regulatory scheme under the AEA leaves no room for state regulation. This is simply not the case.

> While it is certainly true, and a basic underpinning of our federal system that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines,* 312 U.S. at 67, it is also true that a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency

> literally has no power to act, let alone preempt the validly enacted legislation of a sovereign state, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.

Louisiana Public Service Comm'n. v. F.C.C., 476 U.S. 355,, 106 S. Ct. 1890, 1901 (1986). There can be no doubt that DOE has the authority to regulate in the area of radiological safety but that authority does not extend to the area of occupational safety at nuclear facilities to the exclusion of state safety requirements. The Ohio safety requirements cannot be said to "touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Sante Fe Elevator Corp.,* 331 U.S. at 230. Obviously, the AEA and Ohio's safety requirements legislate totally different subjects. Additionally, the areas of occupational health and safety and employee relationships are areas traditionally left to state regulation. *Decanas v. Bica,* 424 U.S. 351, 356 (1976); *Malone v. White Motor Co.,* 435 U.S. 497, 504 (1978).

This Court has recognized the AEA was intended to provide the Federal Government with authority to regulate radiological safety aspects involved in the construction and operation of a nuclear plant. *Pacific Gas and Electric v. State Energy Consrv. & Dev. Comm'n.,* 461 U.S. at 205, 212. No court yet has held that DOE's authority extends to non-radiological safety concerns. Certainly in reading the Act itself, Congress failed to evince the requisite "clear and manifest purpose" to preempt state non-radiological safety requirements at nuclear facilities. *California Federal Sav. and Loan Ass'n. v. Guerra,* ___ *U.S.* ___, 107 S.Ct. 683, 693 (1987).

Goodyear urges the Court to look to the administrative construction of the AEA as indicative of Congressional intent to preempt state safety laws. Admittedly, state laws can be

preempted by federal regulations as well as by federal statutes. *Fidelity Sav. and Loan Ass'n. v. De la Cuesta,* 458 U.S. 141, 153-54 (1982); *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 699 (1984). This Court, however, is "even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes." *Hillsborough County v. Automated Med. Labs.,* 471 U.S. 707, 717 (1985). The mere fact that DOE regulations are comprehensive cannot control this case.

> To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule would be inconsistent with the federal-state balance embodied in our supremacy clause jurisprudence.

Id.

Goodyear diverts the court's attention to a set of DOE orders relating to nonradiological health and safety standards at contractor-operated facilities. These orders apply Federal Occupational Health and Safety Regulations (29 C.F.R. §1910.28) to contracts entered into between private enterprise and the DOE. (Goodyear brief p. 42). It is argued that these "orders" are indicative of the intent to preempt state safety laws as they are applied to these facilities.

As the discussion above shows, DOE's authority to regulate safety at contractor-operated facilities does not extend to non-radiological hazards and certainly does not extend to the extreme of preempting an entire area of state health and safety laws. At least one federal court has held 42 U.S.C. §2201(i)(3) does not vest DOE with exclusive authority to regulate health and safety standards at a facility like the Goodyear plant. *Legal Environmental Assistance Foundation v. Hodel,* 586 F. Supp. 1163, 1167 (E.D. Tenn. 1984).

Furthermore, the impact of these DOE orders must be contrasted with the previously expressed opinion of the AEC that its authority related only to radiological hazards. In the case of *New Hampshire v. Atomic Energy Comm'n.,* 406 F.2d 170 (1st Cir. 1969), *cert. denied,* 395 U.S. 962 (1969), the court affirmed the issuance of a provisional construction permit despite New Hampshire's challenge that AEC had refused to consider environmental factors when issuing the permit. The court deferred to the AEC's position that the references in the Atomic Energy Act to the "health and safety of the public" referred only to radiation hazards. *New Hampshire* at 175-176. Furthermore, the DOE has enacted into its regulations its interpretation of, 42 U.S.C. §2021(k):

> It seems completely clear that the Congress, in enacting section 274, intended to preempt to the Federal Government the total responsibility and authority for regulation, from the standpoint of *radiological* health and safety, the specified nuclear facilities and materials, that it stated that intent unequivocably; (emphasis added)

10 C.F.R. §84(i)(1986). Even in its rules defining the scope of the terms "construction and operation" found in 42 U.S.C. §2021(c) the AEC describes those terms as relating to radioactive materials. 10 C.F.R. §150.15(a)(1)(1986). Certainly, the properly promulgated rules of the AEC interpreting its own statute should be given effect over simple DOE orders which do not appear to be promulgated pursuant to the formal rule-making procedures of the Administrative Procedure Act. 5 U.S.C. §553 (1982). The Court certainly should deny the preemptive effect of these orders particularly when excluding state regulation in an area of traditional police power. *Hillsborough County v. Automated Medical Labs.,* 471 U.S. at 718.

The guidepost in all preemption cases must be Congressional intent, and the intent in this case could not be clearer. Congress in 42 U.S.C. §2021(k), this Court in *Silkwood* and *Pacific Gas & Electric,* and the Atomic Energy Commission itself in 10 C.F.R. §8.4(i) all agree the DOE has authority to

regulate at nuclear facilities regarding radiological hazards and the regulation of non-radiological hazards is reserved to the states. No "clear and manifest purpose" to override Ohio's non-radiological safety requirements can be shown. Thus, the application of Ohio's specific safety requirements to this federal contractor is entirely consistent with state and federal law.

E. Application Of Ohio's Specific Safety Requirements To A Federal Contractor Does Not Stand As An Obstacle To the Accomplishment Of The Purpose Of The Atomic Energy Act.

In order to establish that Ohio safety laws should be preempted, Goodyear must show a conflict "strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough County v. Automated Medical Labs,* 471 U.S. at 718. To determine whether a federal statute precludes enforcement of state laws on the same subject, it is important to consider the nature of the power exerted by Congress, the objectives sought to be obtained, and the character of the obligations imposed by law. *Hines v. Davidowitz,* 312 U.S. 52, 70 (1940).

Goodyear makes vague, generalized assertions that the application of Ohio's specific safety requirements to the Goodyear plant would interfere with the purpose of the Act. Such unspecified impediments cannot be permitted to deprive injured Ohio workers of the protection of the state's occupational safety laws, particularly when that law displaces their common law tort remedies.

Goodyear states the application of Ohio's safety requirements would impose additional costs on the plant which would impair plant efficiency. There can be no doubt that there is no Congressional intent to enforce the Atomic Energy Act "at all costs". *Pacific Gas and Electric Co. v. State Energy Consrvn & Dev. Comm'n.,* 461 U.S. 190, 222 (1983). To say Congress intended to maintain lower operational costs at the expense of the safety of workers at these facilities is just not

plausible. Just as any employer in the State of Ohio who reaps the benefits and protections of the state insurance fund, this federal contractor must maintain a safe working environment to protect the lives of Ohio workers with the resultant reduced economic impact on the state insurance fund. In this respect, Goodyear, as a federal contractor, is treated identically to all employers in Ohio who are subject to the dual requirements of state safety laws and the Federal Occupational Safety and Health Act with their accompanying administrative complications.

This Court has long enjoined "seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 446 (1960). As noted previously, Congress clearly left the states free to regulate non-radiological safety concerns at nuclear facilities. 42 U.S.C. §2021(k). In light of this express Congressional intent, Ohio's regulations, promulgated within the legitimate sphere of state administration, cannot be considered invalid. *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 422 (1973).

Goodyear's reliance on *Oullette* and *Garmon* is misplaced. In both of those cases, Congress had expressed the need for national uniformity of regulation in the legislated area. "In areas that Congress decides require national uniformity of regulation, Congress may exercise power to exclude any state regulation, even if harmonious." *DeCanas v. Bica,* 424 U.S. 351, 359 n.7 (1976). No such Congressional express need for total Federal regulation is present in the AEA. In fact, Congressional intent is expressly contrary. 42 U.S.C. §2021.

Finally, Goodyear contends application of Ohio's safety requirements would conflict with "security regulations" imposed upon the plant. Ohio's specific safety requirements are no more intrusive in that regard than the general workers' compensation laws and Goodyear does not contest the application of those laws. Furthermore, Ohio has no safety requirements which relate to or regulate the safety of radiological machinery. Finally, since the Commission acts only upon

an application for a specific safety award, compliance with security regulations imposed upon Goodyear could be arranged between Goodyear and the Commission prior to the initiation of any investigation. Accommodation of security requirements could be accomplished without ousting the entire field of state safety laws.

DOE has not been vested with the authority to promulgate non-radiological safety and health standards at nuclear facilities to the exclusion of the states. All indications of Congressional intent are to the contrary. Application of the State's safety standards to the Goodyear plant is an exercise of the State's long recognized role to protect the health and safety of its workers. Application of these requirements to a private contractor at a federal facility in no way impedes the purpose of the Atomic Energy Act. As no impediment is present, preemption of Ohio's safety requirements cannot be presumed or recognized.

APPELLEE'S

BRIEF

No. 86-1172

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GOODYEAR ATOMIC CORPORATION,
Appellant,

v.

STATE EX REL. ESTO MILLER,
Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF FOR APPELLEE ESTO MILLER

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QUESTIONS PRESENTED

1. Whether, in the case of a private employer operating a federally-owned nuclear production plant pursuant to contract with the federal government, 40 U.S.C. § 290 authorizes the state in which the plant is located to award increased workers' compensation, more nearly approximating full compensatory relief, to employees whose injuries have resulted from employer conduct that the state deems culpably unsafe.

2. Whether, if § 290 does not provide such affirmative authorization, the state's authority to make such increased awards is impliedly preempted by reason of the federal government's ownership of the plant and/or Congress' conferral upon the federal government of exclusive authority to directly regulate safety practices in the plant.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
ARGUMENT	4
INTRODUCTION AND SUMMARY	4
I. THE PERTINENT FEATURES OF OHIO'S WORKERS' COMPENSATION PROGRAM	6
II. CONGRESS, IN 40 U.S.C. § 290, HAS EXPRESSLY AUTHORIZED OHIO TO MAKE THE AWARD SOUGHT HERE	9
III. EVEN IF 40 U.S.C. § 290 WERE INAPPLICABLE, THE AWARD SOUGHT HERE WOULD NOT BE PREEMPTED	17
CONCLUSION	24

TABLE OF AUTHORITIES

Cases — Page

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975) — 23
California Federal Sav. and Loan Ass'n v. Guerra, —— U.S. ——, 107 S.Ct. 683 (1987) — 9
Director, OWCP v. Perini North River Associates, 459 U.S. 297 (1983) — 12
Hancock v. Train, 426 U.S. 167 (1976) — 18, 20
Industrial Fabricators, Inc. v. Industrial Commission of Ohio, Civ. No. C-2-77-119 (S.D. Ohio) — 6, 8
International Paper Co. v. Ouellette, —— U.S. ——, 107 S.Ct. 805 (1987) — 13, 18
Lynch's Case, 281 Mass. 454, 183 N.E. 834 (1933) — 10
Mayo v. United States, 319 U.S. 441 (1943) — 18
Minneapolis & St. Louis Ry. Co. v. United States, 361 U.S. 173 (1959) — 12
Murray v. Joe Gerrick & Co., 291 U.S. 315 (1934) — 10
Nader v. Allegheny Airlines, 426 U.S. 290 (1976) — 18
Ohio Automatic Sprinkler Co. v. Fender, 108 Ohio St. 149, 141 N.E. 269 (1923) — 6, 7
Penn Dairies v. Milk Control Comm'n, 318 U.S. 261 (1943) — 19, 20
Rubin v. United States, 449 U.S. 424 (1981) — 11
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) — 22
Scott v. Donald, 165 U.S. 58, 88 (1897) — 14
Silkwood v. Kerr McGee, 464 U.S. 238 (1982) — 14, 16, 17, 22, 24
State ex rel. Bailey v. Krise, 18 Ohio St. 2d 191, 249 N.E. 2d 55 (1969) — 7, 8, 23
State ex rel. Emmich v. Individual Comm'n., 148 Ohio St. 658, 76 N.E. 2d 710 (1947) — 7, 8
State ex rel. Loney v. Industrial Accident Board, 87 Mont. 191, 286 P. 408 (1930) — 10
State ex rel. Rudd v. Industrial Commission, 116 Ohio St. 67, 156 N.E. 107 (1927) — 8
TVA v. Hill, 437 U.S. 153 (1978) — 11
United States v. Boyd, 378 U.S. 39 (1964) — 19
Washington v. United States, 460 U.S. 536 (1983) — 19

TABLE OF AUTHORITIES—Continued

Statutes and Regulations — Page

16 U.S.C. § 457 — *passim*
Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.* — 3
40 U.S.C. § 290 — *passim*
Cal. Labor Code, § 4553 (1955) — 12
Mass. Ann. Laws, Ch. 152, § 28 (1965) — 12
Ohio Const. Art. II, § 28 — 19
Ohio Const. Art. II, § 35 — 2, 6, 8
Ohio Rev. Code (1986):
§ 4121.80 — 8
§ 4123.35 — 2
§ 4123.519 — 21
§ 4123.56 — 2
§ 4123.57(A) — 2
§ 4123.77 — 8
Utah Code Ann. § 35-1-12 (1953) — 12
29 C.F.R. 1910.29(a)(2)(v) — 3-4
Ohio Admin. Code § 4121:1-5-03(D)(2) — 3

Legislative History

80 Cong. Rec. 8842 (1936) — 12
H.R. Rep. 2656, 74th Cong., 2d Sess. (1936) — 12, 14
S. Rep. No. 2080, 74th Cong., 2d Sess. (1936) — 12, 14
S. Rep. No. 2119, 74th Cong., 2d Sess. (1936) — 13, 14
S. Rep. No. 2294, 74th Cong., 2d Sess. (1936) — 12, 14, 16

Miscellaneous — Page

Annotation, 16 A.L.R. 620 (1922) — 12
Annotation, 58 A.L.R. 1379 (1929) — 12
Annotation, 68 A.L.R. 301 (1930) — 12
Larson, *The Law of Workmen's Compensation* (1987) — 8, 12, 13
Young, *Workmen's Compensation Law of Ohio* (1971) — 4, 6, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1172

GOODYEAR ATOMIC CORPORATION,
Appellant,

v.

STATE EX REL. ESTO MILLER,
Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF FOR APPELLEE ESTO MILLER

STATEMENT OF THE CASE

The Portsmouth Gaseous Diffusion Plant, located near Piketon, Ohio, produces nuclear materials. The plant is owned by the United States Department of Energy (DOE), but at the times pertinent to this lawsuit was operated by appellant, Goodyear Atomic (using Goodyear's employees) pursuant to a contract between Goodyear and DOE. JA 4.[1]

Ohio's workers' compensation laws are applicable to the Portsmouth Plant notwithstanding DOE's ownership of the plant, by virtue of 40 U.S.C. § 290 (quoted *infra* at 10).[2] Goodyear applied for and became a covered employer under the Ohio workers' compensation law, and paid premiums to the state workers' compensation insur-

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[1] Goodyear no longer operates the plant. *See*, U.S. Br. 11 n.7.

[2] Goodyear and the Solicitor General acknowledge this. Aplt. Br. 27 n.14; U.S. Br. 20-21.

ance fund on behalf of the Portsmouth Plant pursuant to Ohio Rev. Code § 4123.35 (1986).

Appellee, Esto Miller, was an employee of Goodyear working at the Portsmouth Plant. On July 30, 1980, in the course of his employment, Miller fell from a manually propelled work scaffold, and injured his ankle and heel. The fall was caused when Miller's glove caught on a bolt that was protruding from an exposed surface of the guardrail. JA 4. The work Miller was performing at the time of his injury was routine plant maintenance and did not involve nuclear or radiological materials. JA 114-19.

Miller applied to the Ohio Industrial Commission for an award of workers' compensation. Neither Goodyear nor DOE interposed any objection to the Industrial Commission's consideration of the application. Goodyear certified to the Industrial Commission that the injury was compensable under Ohio's workers' compensation program. JA 4, 33-39. Miller received approximately $9,000 in workers' compensation.[3]

Thereafter, Miller made timely application to the Ohio Industrial Commission for an "additional award," invoking the provision of Ohio law that mandates an additional workers' compensation recovery of from 15% to 50% where the injury "resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees" adopted by the state legislature or the Industrial Com-

[3] *See*, Brief for Appellant, p. 8. Miller was paid twenty-nine weeks' compensation for lost work at $258 a week, and sixteen additional weeks' disability at $86 a week. The Ohio Revised Code fixes maximum weekly payments for lost work at 72% of the worker's weekly wage for the first twelve weeks, and 66⅔% thereafter, but not to exceed the statewide average wage. Ohio Rev. Code § 4123.56 (1986). The disability award likewise is computed as a percentage of the worker' weekly wage, but not to exceed ⅓ of the statewide average weekly wage. Ohio Rev. Code § 4123.57 (A) (1986).

mission. Ohio Const. Art. II, § 35.[4] Miller alleged that his injury had been caused by a protruding bolt on the scaffold on which he was working, and invoked Ohio Admin. Code § 4121:1-5-03 (D) (2), which provides, in the case of manually propelled mobile work platforms or scaffolds:

> Exposed surfaces shall be free from sharp edges, burrs, or other projecting parts.

JA 32, 4-5, 40-42. An investigation was conducted, in which the Industrial Commission received: affidavits from the parties (JA 114-19), a stipulation of facts by the parties (JA 50-53), photographs of the accident scene provided by Goodyear (JA 52-53), contemporaneous reports of the accident prepared by Goodyear supervisors (JA 45-47), and a report of the union's safety representative (JA 48-49).

Goodyear opposed Esto Miller's application on the ground that its scaffolding complied with the Ohio Code (JA 43). DOE filed an amicus brief contending that the Industrial Commission could not make an additional award because the plant was owned by DOE and subject to DOE's exclusive safety regulation. DOE has promulgated safety regulations for nuclear production facilities which, in the case of non-radiological hazards (as here), merely direct the plant operator to comply with safety requirements imposed upon American employers generally under the Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.* (currently reflected in DOE Order No. 4583.1A (June 22, 1983) at I-1; *see also*, U.S. Br. 6 n.5). Among the OSHA standards thus declared by DOE to be applicable to this plant is the following re-

[4] The additional award sought by Miller, if granted, would range between a maximum (50% rate) of $129 for twenty-nine weeks and $43 for sixteen weeks, for a total of $4,429 (see n.3, *supra*) to a minimum (15% rate) of $38.70 for twenty-nine weeks and $12.90 for sixteen weeks, totalling $1,328.00.

specting manually propelled mobile work platforms or scaffolds (29 C.F.R. 1910.29(a)(2)(v)):

> All exposed surfaces shall be free from sharp edges, burrs or other safety hazards.

The Industrial Commission ruled that its authority to make an additional award at this plant was preempted. JA 18-22. The Ohio courts reversed, and directed that the Commission decide the application for additional award on its merits, concluding that Congress had not meant to deprive states of the capacity to compensate employees in this fashion for their work-related injuries. JA 4-17. The additional award sought by Miller, if approved, would be paid in the first instance from the state insurance fund, which represents the aggregated premium contributions of all Ohio employers, but in the normal course the Industrial Commission would seek to recoup the amount of the award from Goodyear by means of increased future premiums. Young, *Workmen's Compensation Law of Ohio*, § 16.17 (1971).

ARGUMENT

Introduction and Summary

The issue in this case is not whether Ohio can require obedience to its own standards of industrial safety at DOE-owned nuclear regulatory facilities. We assume, *arguendo*, as the Solicitor General contends (U.S. Br. 12-14), that DOE's regulatory authority is exclusive. The issue in this case, rather, is whether, when the federal government contracts with a private conractor to operate such a facility, and an employee of the contractor is injured on the job, Ohio may apply its traditional workers' compensation rule that the award to the employee will be increased, to an amount more nearly approximating full compensatory relief, when the injury was caused by employer conduct that Ohio deems culpably unsafe.

I. In order to answer that question, it is first necessary to understand the true nature of the increased award. Ohio began by allowing injured employees to sue

their employers at law, and upon proving fault to recover full compensatory relief. When workers' compensation was first adopted in Ohio, it afforded employees *partial* compensatory relief on a no-fault basis, but left employees free to bring actions at law for *full* relief if they could show that the injury resulted from the employer's failure to adhere to an explicit safety requirement. The program was later amended to abolish this action at law, and to "substitute" as a *quid pro quo* an increased award in the workers' compensation process itself if the injury resulted from the requisite employer fault. As the Ohio Supreme Court has repeatedly held, the increased award is compensatory: where the employer is deemed culpable, the injured employee is afforded a recovery more closely approximating full compensatory relief. *See*, pp. 6-8.

II. Congress has expressly authorized states to compensate employees of private contractors injured on federal facilities, both in actions at law applying state liability standards (16 U.S.C. § 457), and in workers' compensation proceedings applying the same standards as the state applies to all other private employers ("in the same way and to the same extent") (40 U.S.C. § 290). Appellant and the United States concede that those provisions are applicable to the plant at which appellee was injured, and § 290 unambiguously authorizes the award sought here. The arguments advanced by appellant and the Solicitor General for ignoring the clear command of § 290 do not survive analysis. *See*, pp. 9-17.

III. Even were § 290 not dispositive, it would not follow that the award sought here is preempted. The award is compensatory: it provides the injured employee a recovery more closely approximating full compensatory relief. There is a heavy presumption against the preemption of state compensatory remedies where Congress has furnished no federal remedy in their stead. And nothing in this case suffices to overcome that presumption. *See*, pp. 17-24.

I. The Pertinent Features Of Ohio's Workers' Compensation Program

In order to address the preemption issue, it is first necessary to understand Ohio's workers' compensation program and, particularly, the role that the additional award at issue here plays in that program. The additional award has evolved out of a three-step progression by which Ohio moved from compensating injured employees exclusively in common law tort actions to the present system in which they are compensated exclusively through the workers' compensation program.

Prior to 1912, a worker injured in Ohio had recourse against his employer through a common law tort action. Recovery depended upon proving fault, but if fault were proved, total compensatory relief was recoverable, as well as punitive damages in appropriate circumstances. Young, *Workmen's Compensation Law of Ohio* § 1.12 (1971); *Industrial Fabricators, Inc. v. Industrial Commission of Ohio*, Civ. No. C-2-77-119 (S.D. Ohio), reprinted at JA 109-13.

In 1912, the citizens of Ohio voted to adopt a constitutional amendment empowering the legislature to enact a workers' compensation system. While allowing as a trade-off the elimination of employee rights to bring common law actions in *some* circumstances, the constitutional amendment by its terms precluded the abolition of common law actions where the injury resulted from a prescribed *quantum* of employer fault:

> Laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers . . . taking away any or all rights of action or defenses from employees and employers; *but no right of action shall be taken away from any employee when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employees.* [Ohio Constitution, section 35, art. 2 (1912) (emphasis added), quoted in *Ohio Automatic Sprinkler Co. v. Fender*, 108 Ohio St. 149, 141 N.E. 269, 275 (1923).]

A statute was promptly enacted implementing this constitutional amendment, *id.*, 141 N.E. at 275. Under the statute, an injured employee could recover in an administrative proceeding a *portion* of true compensatory relief irrespective of employer fault. But the statute did not foreclose the employee from proceeding against the employer in a common law action for a more complete recovery if the requisite employer fault could be proved. "Under the original form of Section 35, as adopted in 1912, an employee, by receiving an award for a compensable injury, was specifically not precluded from maintaining an action at law for his employer's failure to comply with lawful requirements for the protection of the lives, health and safety of employees." *State ex rel. Bailey v. Krise*, 18 Ohio St. 2d 191, 249 N.E. 2d 55, 58-59 (1969).[5]

In 1923, the Ohio constitution was amended again, and the current system emerged. "The amendment of 1923 abolished this right [to bring fault-based suits at law] and *substituted* the additional award from the state insurance fund." *State ex rel Bailey, supra*, 249 N.E. 2d at 59 (emphasis added). The latter was deemed a *quid pro quo* for the cause of action that was being taken from employees. *State ex rel. Emmich v. Individual Comm'n.*, 148 Ohio St. 658, 76 N.E. 2d 710, 715 (1947). Under the current program, an employee is awarded an additional amount consisting of 15-50% of the regular workers' compensation award, if it is determined that "an injury, disease or death resulted because of the failure of the employer to comply with any specific requirement for the protection of the lives, health or safety of employees" adopted by the state legislature or the In-

[5] The kind of employer culpability necessary to entitle an employee to maintain an action at law under the 1912 program was described in *Ohio Automatic Sprinkler, supra*, 141 N.E. at 271-77.

dustrial Commission. Ohio Const. Art. II § 35. The current program thus carries forward the criteria of the earlier program for triggering employer responsibility for a fuller compensatory award, but fixes the measure of additional damages and provides for the adjudication of employer responsibility in the administrative process rather than the courts.[6]

"[T]he primary characteristic of Ohio's additional award . . . is compensatory, not penal." *State ex rel Bailey, supra*, 249 N.E. 2d at 60. *Accord*: *Industrial Fabricators, supra*, JA 112; *State ex rel. Rudd v. Industrial Commission*, 116 Ohio St. 67, 156 N.E. 107, 109 (1927); *State ex rel. Emmich, supra*, 76 N.E. 2d at 715.[7] Because ordinary workers' compensation is but a fraction of full compensatory relief,[8] Ohio accompanied the abolition of actions at law with a provision preserving the opportunity for fuller relief in the administrative process when the injury results from the requisite employer fault. *State ex rel. Emmich, supra*, 76 N.E. 2d at 715. A similar choice has been made in numerous states to escalate compensation to a level closer to true remuneration upon a finding of employer fault.[9]

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[6] The Ohio statute provides that an employer who does not properly arrange for coverage under the workers' compensation program will remain vulnerable to common law suits by its employees, Ohio Rev. Code § 4123.77, as do employers who commit intentional torts against their employees, Ohio Rev. Code § 4121.80.

[7] These cases also declare that a secondary purpose is to deter employers from ignoring safety requirements. *See, e.g., State ex rel. Emmich, supra*, 76 N.E. 2d at 715.

[8] Larson, *The Law of Workmen's Compensation*, §§ 1.10, 1.20, 3.30, 57.10 (1987); Young, *supra*, §§ 1.12 and 7.1-7.47. *See also*, n.3, *supra*.

[9] Several states do this, as Ohio does now, by authorizing a larger award in the administrative proceeding; others do it in the manner Ohio utilized from 1912 to 1923, *viz.*, by allowing employees to pursue common law actions upon a showing of the requisite employer culpability. *See infra*, pp. 12-13, and nn.11-14.

II. Congress, In 40 U.S.C. § 290, Has Expressly Authorized Ohio To Make The Award Sought Here

The federal government owns the premises where Esto Miller was injured, and the Department of Energy has been vested by Congress with authority to regulate safety and health practices on those premises. These two factors have been invoked by appellant and the United States as preempting Ohio's right to make the award sought here.

Assuming *arguendo* that had Congress remained silent these factors could suffice to overcome the heavy presumption against preemption of compensatory remedies (but see pp. 17-18, *infra*), in fact Congress has *not* remained silent. Quite the contrary, Congress has enacted a statute expressly authorizing the award sought here. As the Court's "sole task" in preemption cases is "to ascertain the intent of Congress," *California Federal Sav. and Loan Ass'n v. Guerra*, —— U.S. ——, 107 S.Ct. 683, 689 (1987), an express determination by Congress that state law is *not* preempted is dispositive.

Congress first addressed the question of how injuries on federal premises would be compensated in 1928, when it enacted the following provision now codified as 16 U.S.C. § 457:

> In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; *and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be.* [Emphasis added.]

Although several state courts understood § 457 to authorize workers' compensation awards for employee injuries

incurred on federal premises,[10] this Court held to the contrary in 1934, construing § 457 as applicable "only to actions at law." *Murray v. Joe Gerrick & Co.*, 291 U.S. 315, 318 (1934). Congress promptly responded by enacting (in 1936) 40 U.S.C. § 290, which provides, in pertinent part:

> *Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliance with the State workmen's compensation laws of said States* and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States *shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America* by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State, and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, *in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State* within whose exterior boundaries such place may be. [Emphasis added.]

Appellant and the Solicitor General both concede that § 290 applies to the premises at which appellee Esto Miller was injured, and empowers Ohio to make basic workers' compensation awards such as Miller has already received. (Aplt. Br. 27 n.14; U.S. Br. 20-21.) But those parties contend that § 290 does *not* authorize the *additional* award that is also provided in Ohio's workers' compensation statute. That contention cannot be squared with the plain language of § 290.

The statute declares that the constituted authority of the state charged with enforcement of the state's work-

[10] *See, e.g., State ex rel. Loney v. Industrial Accident Board*, 87 Mont. 191, 286 P. 408 (1930); *Lynch's Case*, 281 Mass. 454, 183 N.E. 834 (1933).

ers' compensation laws—in Ohio, the Industrial Commission—"*shall have the power and authority to apply such laws*" to all federal premises, "*in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State.*" It is not disputed that were the premises here "under the exclusive jurisdiction of the State," the additional award sought here, if shown to be merited under state law, would be granted. And § 290 declares that Ohio's Industrial Commission has "the power and authority" to apply its workers' compensation law "in the same way and to the same extent" to the Portsmouth facility.

"When we find the terms of a statute unambiguous, judicial inquiry is complete, except 'in rare and exceptional circumstances.'" *Rubin* v. *United States*, 449 U.S. 424, 430 (1981), quoting *TVA* v. *Hill*, 437 U.S. 153, 187 n.33 (1978). The arguments proffered here by the Solicitor General and appellant fall woefully short of justification for ignoring the unambiguous language of § 290. They cite nothing that directly indicates a congressional intent to rein in § 290 short of its literal sweep. Instead, they tender tortured exegeses that will not survive examination.

First, it is suggested that as only "a few States" had provisions in their workers' compensation laws in 1936 granting larger awards where the employer violated a safety standard, and as "the legislative history of the statute contains no mention of those obviously atypical provisions," Congress should not be understood to have authorized such awards by its enactment of § 290. U.S. Br. 21. See also, Aplt. Br. 27-28 & n.15. This argument is doubly flawed.

a. The unstated premise of this argument must be that Congress was not aware that some states' workers compensation laws contained these "atypical provisions," for if Congress *was* aware of them the words it chose ("in the same way and to the same extent") hardly manifest an intention to exclude them. But there is no evidence

that Congress was ignorant of these laws, which in fact were not so "atypical" (*see* n.11, *infra*), and courts in any event do not indulge the premise that Congress has proceeded in ignorance. Quite the contrary, the operative premise is that Congress is knowledgeable about existing law pertinent to the legislation it enacts. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 319-20 (1983); *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 187 (1959). That premise is particularly warranted here, for at least ten states had provisions in their workers' compensation laws in 1936 increasing the amount of compensation in the event of specified *quanta* of employer fault,[11] and many others accomplished the same result (fuller compensation in the case of specified employer fault) by authorizing employees to proceed with suits at common law in cases where such fault could be shown.[12] Indeed, the principal impetus for enactment of the bill that became § 290 came from states whose workers' compensation laws provided for increased awards in cases of employer fault.[13] That

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[11] Eight states provided for increased compensation if the employer violated safety regulations or failed to provide required safety devices. In addition to the seven states cited in U.S. Br. 21, n.16, *see* Utah Code Ann. § 35-1-12 (1953). Two other states provided for increased awards in the event of serious and willful misconduct of the employer or its supervisory personnel. Cal. Labor Code, § 4553 (1955); Mass. Ann. Laws, Ch. 152, § 28 (1965).

[12] See statutes and cases cited in Larson, *The Law of Workmen's Compensation*, §§ 68, 69 (1987). These provisions were the subject of numerous contemporaneous annotations in law reporters. *See, Annotation*, 16 A.L.R. 620 (1922); *Annotation*, 58 A.L.R. 1379 (1929); *Annotation*, 68 A.L.R. 391 (1930).

[13] Underlying the drive for enactment of 40 U.S.C. § 290 in the House was concern for the employees then engaged in the construction of the Golden Gate Bridge. H.R. Rep. 2656, 74th Cong., 2d Sess. (1936); 80 Cong. Rec. 8842 (1936). The main sponsor of the bill in the Senate was Senator Walsh of Massachusetts. S. Reps. Nos. 2080, 2294, 74th Cong., 2d Sess. (1936). The workers' compensation laws of both California and Massachusetts provided for increased awards in the case of specified employer fault. See n.11, *supra*.

Congress left the "way" and "extent" of workers' compensation awards to state control demonstrates its awareness that there was diversity among the various state laws, and reflects its intention that the states would control the determinants of compensation. At the least, there is no warrant for adopting, on the basis of a hypothesized congressional ignorance that has no support in the legislative materials, a construction of § 290 that disregards the unambiguous language of the statute.

b. Moreover, it is clear from the context in which § 290 was enacted that fault-based enhancement of workers' compensation awards is entirely consistent with the legislative will. Congress had previously enacted 16 U.S.C. § 457, which expressly left to the states the formulation of standards of liability in court actions for injuries occurring on federal property. In states that still permitted employees to sue their employers at law—and there were many in 1936[14]—it was unquestionable that States could (1) establish the standards of liability, (2) adjudicate whether the particular injury was the product of a breach of those standards, and (3) award full compensation to an employee injured by such a breach.[15] Congress knew when it enacted § 290 that em-

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[14] Two states had not enacted workers' compensation statutes as of 1936. S. Rep. No. 2119, 74th Cong., 2d Sess. 2 (1936). In many other states, workers' compensation coverage was optional with the employer, and large percentages of employers opted to remain with the common law system instead. *Ibid*; Larson, *The Law of Workmen's Compensation*, § 67.10. Many categories of employers were not then covered by workers' compensation laws. Larson, § 67.10. Occupational disease was often not covered by workers' compensation laws. Larson, § 4210. Finally, as noted *supra* p. 12, many states provided employees the option to invoke common law when the employer transgressed a specified fault standard.

[15] Indeed, it seems evident that states could also award punitive damages in such actions. As this Court stated in *International Paper Co. v. Ouellette*, —— U.S. ——, 107 S.Ct. 805, 815 n.19

ployees in many states retained causes of action at law for workplace injuries, and that when employees injured on federal premises brought such suits § 457 was applicable.[16]

When Congress enacted § 290, it did so only because this Court had held that § 457 did not apply to administrative proceedings and Congress feared that, in consequence, employees would be unable to recover for their injuries in those states that had substituted an administrative remedy for the former action at law. The legislative history reflects that Congress acted simply to extend the license of § 457 to a form of proceeding to which, by reason of a technicality in the wording of § 457, the Supreme Court had held it did not apply;[17] there is not a hint anywhere that Congress intended to constrain the *desiderata* upon which states could act under § 290 more narrowly than under § 457.

Second, it is suggested by the Solicitor General that Congress did not mean in § 290 to authorize a "surcharge

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(1987), in explaining its refusal to distinguish between preemption of compensatory and punitive damages:

> As the Court noted in *Silkwood* [*v. Kerr McGee*, 464 U.S. 238, 255 (1984)], unless there is evidence that Congress meant to "split" a particular remedy for pre-emption purposes, it is assumed that the full cause of action under state law is available (or, as in this case, preempted)."

In *Silkwood*, 464 U.S. at 255, the Court, observing that "[p]unitive damages have long been a part of traditional state tort law," ruled that the burden is on the proponent to show that Congress in authorizing state tort suits meant to exclude punitive damages, and declared that a conclusion to that effect will not be drawn absent positive evidence in the legislative history of such an intent. Punitive damages had already been a "well-established" part of traditional state tort law for more than a century when 16 U.S.C. § 457 was enacted. *Scott v. Donald*, 165 U.S. 58, 88 (1897).

[16] S. Rep. No. 2119, 74th Cong., 2d Sess. 2-3 (1936); H.R. Rep. No. 2656, 74th Cong., 2d Sess. 1-2 (1936).

[17] S. Rep. No. 2080, 74th Cong., 2d Sess. 1-2 (1936); S. Rep. No. 2119, 74th Cong., 2d Sess. 2-3 (1936); S. Rep. No. 2294, 74th Cong., 2d Sess. 1-2 (1936); H.R. Rep. No. 2656, 74th Cong., 2d Sess. 1-2 (1936).

. . . over and above what is normally deemed sufficient compensation for a particular injury" (U.S. Br. 21). But Ohio's additional award is not a "surcharge" above complete compensatory relief, it simply brings compensation closer to the complete relief that would have been available at common law. That a state "deems" a partial recovery "sufficient compensation" when the employer is not at fault does not mean that it will "deem" that same recovery "sufficient" as against an employer at fault. In Ohio, the fault-based additional award was a direct substitute for the fault-based common law remedy it replaced. Nothing in the legislative materials supports the unlikely proposition that Congress, having authorized fault-based standards of liability in § 457, intended to forbid like standards in § 290. And this silence is especially significant, for Congress was conscious when it enacted § 290 that in many states employees could sue their employers in actions that were authorized by § 457 (*supra*, pp. 13-14 & n.16).

Third, the Solicitor General and appellant also point to the fact that Congress, in enacting § 290, rejected a proposal that would have empowered states, in addition to compensating employees, to directly regulate safety practices on federal premises.[18] They argue that Congress'

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[18] The Congressional explanation for rejecting the proposal for direct state safety regulation appears at S. Rep. No. 2294, 74th Cong., 2d Sess. 2 (1936):

> The committee have amended this bill in the form passed by the House by striking out all provisions subjecting Federal property to State safety and insurance regulations and also eliminating provisions authorizing State officers to enter upon Federal premises. These provisions were objected to by the procurement agencies of the Government inasmuch as such provisions would not only produce conflicts of authority between State and Federal officers but would also mark a wide departure from the well-established principle that Federal officers should have complete charge of any regulations pertaining to Federal property. It was the conclusion of the committee that the principal reform which this bill sought to achieve could be attained without the inclusion of these clauses.

disinclination to permit direct state regulation of safety justifies construing § 290 not to permit indirect regulation in the form of monetary impositions for nonadherence to state standards of proper behavior. (U.S. Br. 22; Aplt. Br. 28-29.) However logical the inference might be if § 290 stood alone, it has no logic at all given that § 290 was enacted against the backdrop of § 457. It would be incongruous, indeed, to attribute to Congress the intention that the states' ability to "regulate" through setting liability standards depended upon whether they created actions at law (authorized by § 457) or administrative proceedings for redress (authorized by § 290.) Yet that is the ineluctable thrust of the argument made by appellant and the United States.

In § 290, Congress expressly empowered the states to compensate employees on federal premises according to whatever standards of entitlement were applied to employees on privately-owned premises ("in the same way and to the same extent"). That Congress rejected *direct* state safety regulation thus reflects nothing more than that Congress did not want states *directly* regulating safety on federal property. This Court's analysis in *Silkwood*, 464 U.S. at 256, is equally applicable here:

> In sum, it is clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear incidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.

III. Even If 40 U.S.C. § 290 Were Inapplicable, The Award Sought Here Would Not Be Preempted

Were this Court to construe 40 U.S.C. § 290 as inapplicable, it still would not follow that the award sought here is preempted. In that event, there would be no statute expressly declaring, either way, whether such awards are preempted, and this Court's task would be the more complex one of determining whether preemption is to be *implied*.

1. The starting point of that inquiry is recognizing that the award sought here is compensation for injuries appellee has suffered. The "basic" workers' compensation award that appellee has already received does not in any sense constitute—indeed, is not designed or expected to constitute—full compensatory relief (see *supra*, p. 8 & n.8). Ohio is prepared to provide appellee additional compensation—a larger portion of full compensatory relief—if the injury is found to have resulted from conditions that conflict with Ohio safety standards. The question, thus, is whether federal law, although not itself furnishing appellee the compensatory relief at issue, nonetheless should be construed as impliedly denying Ohio the right to furnish that remedy.

As this Court has explained, there is a strong presumption *against* preemption of state compensatory remedies, absent express indication by Congress that it intends to leave victims without remedy. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984):

> [Congress'] silence takes on added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct [*i.e.* conduct violative of "state-imposed safety stand-

> ards"]. It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.

See also, id. at 263-64 (Blackmun, J., joined by Marshall, J., dissenting):

> It is true that the prospect of compensating victims of nuclear accidents will affect a licensee's safety calculus. Compensatory damages therefore have an indirect impact on daily operations of a nuclear facility. But . . . [b]ecause the Federal Government does not regulate the compensation of victims, and because it is inconceivable that Congress intends to leave victims with no remedy at all, the pre-emption analysis . . . compels . . . the conclusion that compensatory damages are not preempted . . . [Footnote omitted].

And *see, Nader v. Allegheny Airlines*, 426 U.S. 290, 298 (1976).[19]

2. Appellant and the United States seek to reverse the presumption respecting preemption. They contend that, as appellee was injured on federally-owned property, the applicable principle is that states cannot regulate unless Congress "affirmatively declare[s] its instrumentalities or property subject to regulation." *Hancock v. Train*, 426 U.S. 167, 179 (1976), quoting *Mayo v. United States*, 319 U.S. 441, 447 (1943). Having dismissed 40 U.S.C. § 290 as inapplicable, they reason that the resultant congressional silence means that states cannot regulate in the manner proposed here. (U.S. Br. 16-19; Aplt. Br. 19-30).

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[19] The principle stated in text is not undercut by the Court's decision in *International Paper Co. v. Ouellette*, —— U.S. ——. 107 S.Ct. 805 (1987), upon which appellant heavily but mistakenly relies (Aplt. Br. 45-46 & n.29). The issue in *Ouellette* was not *whether* victims would have access to state law for compensation, but *which* state's law would govern compensation in instances of water pollution having multi-state effects. As it was indisputable that *some* state's compensation program would be available in *Ouellette*, the considerations underpinning the presumption against preemption were not present.

The fallacy in this contention is, however, candidly acknowledged in the Solicitor General's brief (U.S. Br. 15):

> [T]his case, as it arose and as it was presented to [the Ohio Supreme Court], did not involve a regulation imposed directly on the federal government or a regulation enjoining how the 'instrumentalities or property' of the federal government are to be employed. Rather, the case involved the imposition of a monetary workers' compensation surcharge on Goodyear, a private party, for activities conducted under contract with and on behalf of the federal government. [Footnote omitted].[20]

There are, of course, limits on the extent to which states can regulate private parties who contract with the federal government to perform a federal mission. But the preemption standard applicable to state regulation of government contractors is quite different from that applicable to direct state regulation of federal facilities. State regulation of government contractors does not *require* an affirmative grant of authorization by Congress; rather, such regulation is allowed unless it is "shown to be inconsistent with Congressional policy." *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 271 (1943). *See also, e.g., United States v. Boyd*, 378 U.S. 39, 44 (1964); *Washington v. United States*, 460 U.S. 536, 540 (1983); Aplt. Br. 30; U.S. Br. 23.

In an effort to escape the *Penn Dairies* standard, the Solicitor General undertakes a lengthy argument that the regulation of the government contractor here, although it "does not directly mandate specific federal conduct"

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[20] In the footnote (U.S. Br. 15, n.13), the Solicitor General explains why this passage is written in the past tense: Ohio has changed its statute subsequent to the decision below, *inter alia*, to require the issuance of directions to employers to comply with safety standards. We agree with the Solicitor General that the new provision could not be applied to the facility here, and that that provision is not at issue here. Moreover, it seems clear that Ohio would not apply the new provision retroactively to this case, given the anti-retroactivity provision of the Ohio Constitution, Art. II, § 28.

(U.S. Br. 16), is so intrusive on the federal function that it "should be *deemed* a 'regulation' of the federal facility subject to the principle of *Hancock v. Train*" (U.S. Br. 19 (emphasis added); *see generally, id.* at 16-19). This exercise in semantics has no precedent in this Court's decisions (indeed is in the teeth of those decisions) and imports a fiction ("should be deemed") that would needlessly confuse the development of sound legal principles and results.

If, indeed, state regulation of a government contractor unacceptably intrudes on the federal interest, that can be shown and the regulation will be preempted under the *Penn Dairies* standard. No new test is needed to protect federal interests, and the existing test focuses the courts on the right question: whether a conflict with federal interests truly exists. The fiction advocated by the Solicitor General would, by contrast, inject a standardless instrument for categorizing regulation of government contractors, pursuant to which courts would without meaningful guidelines predetermine the outcome of preemption inquiries by the label hung on the regulation: that "deemed" regulation of the federal facility would fall automatically unless saved by express congressional authorization; that not so "deemed" would stand absent conflict with congressional policy.

Moreover, adoption of the fiction proposed by the Solicitor General would frustrate judgments Congress has already made: Congress has had every right to assume that state regulation of government contractors is permissible unless in conflict with congressional policy, and thus has not understood that there is a a need expressly to authorize such regulation. A *post hoc* change requiring express congressional authorization would plainly upset the federal-state balances that Congress has sanctioned in reliance on the standard this Court has consistently applied heretofore.

3. Thus, assuming that 40 U.S.C. § 290 is not construed as affirmatively authorizing the award at issue,

resolution of this case will turn on the following calculus. Ohio is presumptively entitled to compensate Esto Miller by making the additional award he seeks. That presumption would be overcome, however, were the award "shown to be inconsistent with Congressional policy." As we now demonstrate, that showing has not and cannot be made.

The key is 16 U.S.C. § 457, which stands as an irrefutable demonstration that there is *not* a discernible congressional policy opposed to the enforcement of state fault-based standards of liability on federal facilities. To be sure, § 457 is inapplicable to workers' compensation proceedings (*supra*, pp. 9-10). But in § 457 Congress has clearly authorized states to fashion their own standards of liability, and to enforce them in actions at law arising from injuries on federal facilities. As the degree of state-federal conflict is the same whether such standards are enforced initially in court or by an industrial commission subject to judicial review (Ohio Rev. Code § 4123.519 (1986)), there cannot be a rational predicate for finding the latter preempted when the former is not.[21]

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[21] Although the Solicitor General's brief nowhere mentions § 457, it does argue that Ohio's standard for increasing compensation, because "specific", is somehow more vulnerable to preemption than would be a "general tort-law standard[]" (U.S. Br. 19). There is a singular irony to this contention, for the specificity requirement was injected into Ohio law out of consideration for employers: as part of the trade-off that accompanied the transition from tort liability to workers' compensation liability, it was thought fair to relieve employers of the higher level of liability in those circumstances where fault would not be self-evident, even though the consequence was a shortfall to the injured employee, and to subject employers to responsibility for more complete compensatory awards only for conduct which they had been clearly "forewarn[ed]" would trigger that consequence. See cases cited at U.S. Br. 19.

In any event, the purported distinction is triply specious. 16 U.S.C. § 457 does not confine states to "general tort-law standards" as the criteria for making victims whole in actions at law, and there is no reason to attribute to Congress a policy that would more narrowly constrict the standards of liability allowable in administrative proceedings. Moreover, "general" standards are

It remains true, of course, that there is always some potential for friction when states compensate while the federal government regulates. (*See*, U.S. Br. at 24-26). But that potential exists invariably, and has not generally been understood to be sufficient predicate to infer that Congress intended to deprive victims of compensation. *See*, *Silkwood*, quoted *supra* at 17-18. The Solicitor General cites *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) as supporting his contrary position. But that case turned on a finding that Congress did not intend in the labor-management area to allow "two law-making sources to govern," *id.* A similar finding cannot be made in the instant case, given Congress' express determinations in 16 U.S.C. § 457 and 40 U.S.C. § 290 to allow states to compensate victims pursuant to state standards.

Of course, cases can be envisioned in which a state's standard of liability collided with federal interests so directly that a preemption ruling might be warranted. If, for example, a state graduated the amount of monetary liability in direct opposition to compliance with federal safety regulation—requiring contractors to pay higher compensation if they obeyed federal regulations and less if they disobeyed—the limit recognized in *Silkwood* would be present: there would be "an irreconcilable conflict between the federal and state standards," 464 U.S. at 256. It cannot be supposed that Congress intended by enacting § 457 to tolerate such direct collisions in the context of actions at law. For the same reasons, workers' compensation awards of the same character would be malign. But that is not this case. Here, the

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far more "regulatory" (and thus intrusive) than "specific" ones: in order to satisfy general standards, employers would have to do all that is required by specific standards *and then some*. Finally, § 457 almost surely authorizes states to award punitive damages in actions at law (*see* pp. 13-14, n.15, *supra*), and it would be a strange Congress indeed that authorized that result but forbade states to hold employers accountable for *compensating* injuries that were caused by conduct they were specifically forewarned would trigger employee entitlement to such compensation.

employer conduct that would prompt Ohio to increase compensation is conduct that is expressly *forbidden* by the DOE's *direct* safety regulation: the Ohio liability standard and the federal regulatory standard are almost word-for-word identical (see pp. 3-4, *supra*). Moreover, Ohio has a *state* law rule against making additional awards where the employer conduct invoked as justification for the award is compelled by the direct regulatory authority of another sovereign. *State ex rel. Bailey*, *supra*, 249 N.E. 2d, at 60. Thus, in Ohio, there is not even the *potential* for the "irreconcilable conflict" hypothesized in *Silkwood*.

4. Finally, the implied preemption analysis is not altered by the fact that the plant Goodyear operates is a nuclear production facility. Congress could, of course, determine that the nature of the facility required a greater limit on the states' entitlement to compensate injured employees than the limit applied with respect to other federal facilities. But the dispositive fact is that Congress has *not* chosen to do so, at least to date.

The insight of *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 262-64 (1975), albeit articulated in a quite different context, is applicable here. Whether there are federal facilities that should receive separate treatment respecting compensation, and if so in what respects, "are matters for Congress to determine," *id.* at 262. Congress "has the power and judgment to pick and choose among its statutes . . . [b]ut it would be difficult, indeed, for the courts, without legislative guidance" to make such choices, *id.* at 263-64. Moreover, were Congress to determine that particular facilities warranted greater restrictions on the states' authority to compensate, Congress would presumably address in that context the question whether a federal compensatory scheme should take up the slack. This Court, if it started down the road of selective exceptions from state compensatory authority, would have no comparable capacity to fill the hiatus thus created.

Even on the hypothesis that this Court could make selective determinations of this type, appellant and the Solicitor General have not made a showing that could justify exceptional treatment for this plant. That DOE alone may directly regulate safety, if true, does not distinguish this plant from the general run of plants discussed in *Silkwood*. The only factor cited in the Solicitor General's brief that distinguishes the facility here from others in which the federal government reserves exclusive regulatory control is the understandable concern for national security. (U.S. Br. 6, 25-26.) That concern might in appropriate circumstances justify refusing Ohio investigators access to the premises (or to files, etc.), and if the consequence were an inability of Ohio to implement its statute that would be a natural byproduct of the Supremacy Clause. But that concern could hardly justify blanket and universal preemption of compensatory remedies such as that sought here. Where, as here, the record can be compiled without violence to the federal government's security requirements (see p. 3, *supra*), there is no federal interest that competes with the state's legitimate interest in compensating its injured citizen.

Indeed, were security an automatic trump, it is difficult to understand why it would not be equally applicable to the basic workers' compensation award that appellant and the Solicitor General concede was not preempted. The issues that must be resolved in determining entitlement to *that* award (*e.g.*, whether the injury was job-related) will likewise require knowledge of what happened inside the plant.

CONCLUSION

Appellant and the Solicitor General would divide the Ohio workers' compensation plan in two. They would have appellant pay the basic workers' compensation, but not the additional award. Appellant would thereby enjoy the benefit of insulation from state tort suits that Ohio conferred when it adopted the present workers' compensation program, without exposure to the *quid pro quo*—

the additional award—that Ohio enacted as the substitute for those tort suits.

As we have shown, Congress has clearly manifested its intent, in 40 U.S.C. § 290 and 16 U.S.C. § 457, to permit states to compensate employees in the manner utilized by Ohio. And assuming *arguendo* that those provisions were not deemed dispositive, there is no justification for departing here from the judgment this Court has heretofore attributed to Congress in parallel implied preemption cases: where Congress has committed direct regulatory authority over safety and/or health matters to a federal agency, but has provided no federal compensatory remedies to those injured, Congress is presumed to have intended that the states would remain free to compensate those injured pursuant to state standards of liability. That presumption properly reconciles the respective roles of the federal and state governments in an area in which both have important roles to play. Congress of course is free to dictate a contrary result should it deem that necessary to vindicate the federal interest; but there is no evidence that Congress has made that atypical choice here.

For the reasons set forth above, the decision below should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1987

GOODYEAR ATOMIC CORPORATION,
Appellant,

v.

STATE EX REL. ESTO MILLER,
Appellee.

On Appeal From The Supreme Court Of Ohio

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TABLE OF CONTENTS

	Page
ARGUMENT	1
A. Introduction	1
B. Ohio's System Of Providing Additional Awards For Violation Of Specific Safety Requirements Constitutes State "Regulation" Of The Portsmouth Facility	2
C. 40 U.S.C. §290 Does Not Expressly Authorize Payment Of The Additional Award	5
1. 16 U.S.C. § 457 Is Irrelevant To This Case	7
2. Section 290 Should Not Be Construed To Authorize Imposition Of The "Fault-Based" Liability Involved In This Case	8
3. The Atomic Energy Act Overrides Any Express Authorization In Section 290	14
D. The Ohio Additional Awards Scheme Cannot Be Applied In The Case At Bar	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Alabama v. King & Boozer, 314 U.S. 1 (1941) 18

Busic v. United States, 446 U.S. 398 (1980) 14

Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962) 9

California Federal Savings and Loan Ass'n v. Guerra, ___U.S. ___, 107 S. Ct. 683 (1987) 7

Crawford Fitting Co. v. J.T. Gibbons, Inc., ___ U.S. ___, 107 S. Ct. 2494 (1987) 14

Environmental Protection Agency v. California ex rel. State Water Resources Control Board, 426 U.S. 200 (1976) 6

Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974) 13

Hancock v. Train, 426 U.S. 167 (1976) 1,2,5,6,17

Harrison v. Northern Trust Co., 317 U.S. 476 (1943) 7

Immigration and Naturalization Service v. Cardoza-Fonseca, ___ U.S. ___, 107 S. Ct. 1207 (1987) 13

International Paper Co. v. Ouellette, ___ U.S. ___, 107 S. Ct. 805 (1987) 2

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) 9

Morton v. Mancari, 417 U.S. 535 (1974) 14

Murray v. Joe Gerrick & Co., 291 U.S. 315 (1934) 8

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980) 13

Noguiera v. New York, New Haven & Hartford Railroad Co., 281 U.S. 128 (1930) 10

Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983) 15

Table of Authorities Continued

Page

Penn Dairies, Inc. v. Pennsylvania Milk Control Comm'n, 318 U.S. 261 (1943) 17

Powell v. United States Cartridge Co., 339 U.S. 497 (1950) 18

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 5

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 16

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) 9

State ex rel. Emmich v. Industrial Commission, 148 Ohio St. 658, 76 N.E.2d 710 (1947) 4

State ex rel. Holdosh v. Industrial Commission, 149 Ohio St. 179, 78 N.E.2d 165 (1948) 4

State ex rel. Miller Plumbing Co. v. Industrial Commission, 149 Ohio St. 493, 79 N.E.2d 553 (1948) 4

Tidewater Oil Co. v. United States, 409 U.S. 151 (1972) 7

United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954) 17

United States v. American Trucking Ass'ns, 310 U.S. 534 (1940) 7

United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948) 9

United States v. Stewart, 311 U.S. 60 (1940) 9

Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924) 9

CONSTITUTIONAL PROVISIONS:

Ohio Const. Art. II, § 35 4,7

STATUTES:

Pub. L. No. 69-803 9

Table of Authorities Continued

	Page
Pub. L. No. 92-576	10
16 U.S.C. § 457	7,8
33 U.S.C. § 904(b)	10
33 U.S.C. § 941	11
40 U.S.C. § 290	1,2,6,12
42 U.S.C. § 2021	15
42 U.S.C. § 2061	14,15
42 U.S.C. § 2201	15
OTHER MATERIALS:	
80 Cong. Rec. 8714	12
80 Cong. Rec. 8724	11
H.R. Rep. No. 1767, 69th Cong., 2d Sess.	10
H.R. Rep. No. 2287, 85th Cong., 2d Sess.	11
S. Rep. No. 973, 69th Cong., 1st Sess.	11
S. Rep. No. 2294, 74th Cong., 2d Sess.	12

ARGUMENT

A. Introduction

The briefs of appellees and *amici* amply demonstrate that the focus of this case has shifted dramatically on this appeal. Significantly, neither appellees nor *amici* attempt to defend the reasoning of the Ohio Supreme Court. Rather, they seek affirmance of that court's judgment on the basis of arguments and authorities—such as 40 U.S.C. §290—that were neither presented to nor considered by the lower court.

Even the most cursory reading of the opinion below reveals why appellees have pursued such "fall back" arguments. The Ohio court's broad suggestion that states are free to regulate non-radiological safety matters at all nuclear plants or facilities, regardless of their type or ownership, is not only predicated upon clearly erroneous grounds, but fails to recognize the fundamental relevance of the federal government's ownership of the Portsmouth facility here at issue. That the majority omits any discussion of *Hancock v. Train*, 426 U.S. 167 (1976), and fails to address the distinct statutory scheme governing regulation of federally owned nuclear production and utilization facilities, is undeniable evidence of the Ohio court's lack of understanding of the issues. Finally, appellees and *amici* have essentially conceded that the opinion below is demonstrably erroneous.[1] Clearly, the overbroad and incorrect opinion of the court below should be expressly disavowed by this Court.

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[1] Appellee Miller acknowledges that the Ohio court's analysis is incorrect and that direct regulation of even non-radiological safety at the Portsmouth facility is constitutionally impermissible. *See* Appellee's Br. at 19 n.20.

Despite his concessions regarding the erroneous nature of the decision, Appellee Miller raises three broad, alternative arguments in favor of affirming the judgment of the Ohio Supreme Court. First, he maintains that the Ohio VSSR system is compensatory, and not regulatory, in nature. Second, he contends that, through a 1936 statute, 40 U.S.C. § 290, Congress has specifically authorized application of the Ohio system to the Portsmouth facility. Finally, he asserts that, even if Section 290 does not provide specific authorization, Ohio's system nevertheless may be applied to the Portsmouth facility.[2] As will be demonstrated, all of these contentions fail to survive analysis. More curiously, and more significantly, however, appellee's brief fails to consider the relevance of the Atomic Energy Act of 1954—the Act which authorized and which governs the operation of the federally owned nuclear production and utilization facility managed by appellant—in the preemption equation.

B. Ohio's System Of Providing Additional Awards For Violation Of Specific Safety Requirements Constitutes State "Regulation" Of The Portsmouth Facility

In *Hancock v. Train* this Court affirmed the fundamental principle that, absent express Congressional authorization, state regulation of federal facilities is constitutionally prohibited. Most recently in *International Paper v. Ouellette*, ___ U.S. ___, 107 S.Ct. 805 (1987), this Court extended that prohibition to com-

[2] These arguments also are raised by appellee Industrial Commission of Ohio and *amici*. Other contentions made by appellee Industrial Commission and *amici* are sufficiently answered by appellant's initial brief and thus do not merit an additional response.

pensatory damage schemes where the monetary remedy impacts a "regulatory effect." Despite his acknowledgement that those principles apply to the Portsmouth facility,[3] however, Miller asserts that the Ohio requirements are merely compensatory and therefore not prohibited in this case. His argument not only mischaracterizes the basic intent behind the Ohio scheme, but ignores its practical effect on operations such as Portsmouth.

To be sure, an additional award under the Ohio scheme is paid to the injured employee and thus is compensation in the most rudimentary sense. Yet, the primary purpose of the law is to promote safety through *regulation* of employer conduct. As acknowledged by appellee Industrial Commission of Ohio:

> Prevention is as much a theme in the statute as is compensation. Without the ability to enforce its safety rules, there is little the Commission can do to ensure safety in the workplace . . .

Industrial Commission Br. at 22.

Likewise, appellee Miller's characterization of the Ohio scheme as merely providing "fuller compensatory relief" to an injured employee is not only inaccurate, but immaterial to the Supremacy Clause analysis applicable to this case. Under Ohio law, an employee who is injured on the job in the absence of his employer's violation of a specific safety requirement is deemed *fully compensated* when he receives the basic benefits established by statute. It is only when violation of a state specific safety requirement

[3] *See* n.1, *supra*.

is involved that an additional award may be made. Although the payment is made directly to the employee, the basic penal nature of the award is clear. As the Ohio Supreme Court observed in *State ex rel. Emmich v. Industrial Commission*, 148 Ohio St. 658, 669, 76 N.E.2d 710, 715 (1947):

> The imposition of an additional award acts as a deterrent to every employer from omitting compliance with legal specific safety requirements, and, in that respect, the additional award becomes compensation in the nature of a penalty.

The specific safety requirements which give rise to the penalty payments are promulgated by an administrative agency and "have the effect of legislative enactments." *State ex rel. Miller Plumbing Co. v. Industrial Commission*, 149 Ohio St. 493, 496, 79 N.E.2d 553, 555 (1948). The requirements must be of sufficient clarity and definiteness so as "plainly to apprise an employer of his legal obligations toward his employees." *State ex rel. Holdosh v. Industrial Commission*, 149 Ohio St. 179, 182, 78 N.E.2d 165, 166 (1948). Finally, compliance is enforced by an administrative body which, by law, must impose additional award liability if a violation is found, Ohio Const. Art. II, § 35, and whose decision is not subject to direct judicial review. To suggest that operations such as Portsmouth can blithely disavow these requirements ignores the practical reality.

The relevant question in this case is not whether the Ohio system is compensatory, but whether it is also regulatory for purposes of Supremacy Clause analysis. The effect, not the purpose, of the state

scheme is determinative. That Ohio enforces employer compliance with specific safety requirements through payment or threat of payment of additional awards to injured persons does not alter the regulatory effect of the Ohio system. "[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

The compensatory element of the Ohio system merely places a superficial veneer over a carefully crafted scheme to regulate the conduct, maintenance, and operation of a workplace. The Ohio system is intended to have, and does have, the effect of channelling operation of a facility in conformity with a broad range of specific requirements promulgated and enforced by a state administrative agency. It is plainly regulatory in effect and, as such, cannot be applied to the Portsmouth facility.

C. 40 U.S.C. § 290 Does Not Expressly Authorize Payment Of The Additional Award

Appellee Miller next contends that the doctrine of federal facility immunity from state regulation set forth in *Hancock v. Train* is inapposite because 40 U.S.C. §290 expressly authorizes the application of Ohio's VSSR scheme to appellant in this case. Appellee's argument fails for two reasons: first, Section 290, standing alone, does not permit imposition of additional award liability; and second, even if it did so, its application to the case at bar is countermanded by the terms and intent of the Atomic Energy Act.

Appellee notes that Section 290 sanctions application of "State workmen's compensation laws" to federal property "in the same way and to the same

extent as if said premises were under the exclusive jurisdiction of the State." 40 U.S.C. § 290.[4] On the basis of this language, he contends that Section 290 unambiguously authorizes enforcement of all laws within the sweep of state workers' compensation schemes including, *inter alia*, the additional awards component of the Ohio system. *See* Appellee's Br. at 9-11.[5] Appellee thus urges this Court to conclude that

[4] It is worth noting that the language of Section 290 mirrors the text of Section 118 of the Clean Air Act, construed by this Court in *Hancock*. Section 118 provided that federal entities "shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." 426 U.S. at 172. Despite that language, the *Hancock* Court concluded that Congress had not demonstrated an intent "to subject[] federal installations to state permit requirements" with "satisfactory clarity." *Id.* at 198; *see also Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976) (reaching similar decision with respect to analogous provision of Federal Water Pollution Control Act Amendments). These cases suggest that the general authorization conferred by Section 290 cannot, in any event, constitute the "clear and unambiguous" congressional mandate, required by the *Hancock* doctrine, to permit imposition of state specific safety requirements upon a federal facility.

[5] Somewhat mysteriously, appellee concedes that the current Ohio workers' compensation laws relating to violation of specific safety requirements, adopted after the injury giving rise to this case, could not be applied to regulate the operation of the Portsmouth facility. *See* Appellee's Br. at 19 n.20. This concession, of course, is squarely at odds with appellee's contention that Section 290 unambiguously sanctions application of *all* state workmen's compensation laws to contractors operating on federal property. There is no principled basis for distinguishing the current statute from the additional awards scheme sought to be applied here: both are derived from authority conferred by Ohio

the "plain meaning" of "State workmen's compensation laws" necessarily encompasses state laws imposing upon federal contractors additional penalty payments for violation of safety standards promulgated by a state administrative body.

Compelling evidence in the legislative history suggests that Congress did not intend Section 290 to authorize states to impose penalties, even in the form of additional awards, for employer violation of state safety requirements.[6] Rather, it is quite plain that Congress intended Section 290 to permit only application of the typical no-fault workers' compensation scheme.

1. 16 U.S.C. §457 Is Irrelevant To This Case

Appellee argues that 16 U.S.C. § 457 informs the proper construction of Section 290. *See* Appellee's Br. at 9, 13-15. Specifically, appellee contends that since Section 457 mandates imposition of "fault-based" liability, Section 290 must be construed as authorizing imposition of "fault-based" liability as well. His ar-

Const. Art. II, § 35 and, under appellee's construction of Section 290, both should apply to the Portsmouth plant. Appellee's concession thus reveals that Section 290 is not as unambiguous as is contended.

[6] It is, of course, wholly appropriate to refer to legislative materials to aid the construction of statutory language. *See Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943) ("words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination' ") (quoting *United States v. American Trucking Ass'ns*, 310 U.S. 534, 544 (1940)); *see also California Federal Savings and Loan Ass'n v. Guerra*, ___U.S. ___, ___, 107 S. Ct. 683, 691 (1987); *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972).

gument completely misses the mark. While Section 290 undoubtedly was enacted in response to this Court's interpretation of Section 457 in *Murray v. Joe Gerrick & Co.*, 291 U.S. 315 (1934), Section 457 does not mention "workers' compensation laws" and, thus, cannot aid in determining the meaning of that term for purposes of Section 290 analysis. Moreover, Section 457, by its terms, applies only to federal enclaves—i.e., places "subject to the exclusive jurisdiction of the United States"—and not to federal facilities such as the Portsmouth plant.

Most significantly, however, appellee's contention that Section 457 *imposes* "fault-based" state law liability upon the federal government or its instrumentalities is legally inaccurate. Section 457 merely removes the territorial bar to assertion of state law negligence or wrongful death actions for injuries sustained in federal enclaves. Unlike Section 290, which expressly makes state "workman's compensation laws" applicable to all federal enclaves and properties "as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be," Section 457 does *not* waive any federal immunities or defenses and does *not* mandate automatic "fault-based" liability. Thus while Section 290 may implicate *Hancock*, Section 457 clearly does not and appellee's reliance upon Section 457 in construing Section 290 to authorize penal awards such as those involved herein is utterly misplaced.

2. Section 290 Should Not Be Construed To Authorize Imposition Of The "Fault-Based" Liability Involved In This Case

A contemporaneous federal statute—the Longshoremen's and Harbor Workers' Compensation Act, Pub.

L. No. 69-803, 44 Stat. 1424 (1927), *codified as amended at* 33 U.S.C. § 901 *et seq.*—provides more appropriate guidance in determining the meaning of "State Workmen's compensation laws" for purposes of Section 290. The Longshoremen's Act, like Section 290, was enacted to fill a gap in workers' compensation coverage caused by a decision of this Court.[7] *See generally Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962). In *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), this Court held that a state workers' compensation act could not constitutionally be applied to an injury sustained in an area deemed exclusively within federal maritime jurisdiction. Congress first attempted to remedy the problem by enacting statutes which, like Section 290, made state workers' compensation laws applicable to such situations, but those statutes were declared unconstitutional. *See Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). Accordingly, in 1927 Congress enacted the Longshoremen's Act to provide an equivalent federal workers' compensation remedy where, under *Jensen* and its progeny, state workers' compensation laws might not apply. *See* Pub. L. No. 69-803, 44 Stat. 1426, § 3(a);[8] *see also Calbeck v. Trav-*

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[7] It is well settled that acts dealing with the same subject matter are "in pari materia" and should be construed together. *See United States v. Stewart*, 311 U.S. 60, 64 (1940). Moreover, "[r]emedial laws are to be interpreted in the light of previous experience and prior enactments." *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 112-13 (1948).

[8] The Longshoremen's Act, § 3(a), originally stated that it applied "if recovery for disability or death through workmen's compensation proceedings may not validly be provided by State

elers Insurance Co., 370 U.S. at 120-22; H.R. Rep. No. 1767, 69th Cong., 2d Sess. 20.

Significantly, the federal workers' compensation system established by the Longshoremen's Act provides for employer liability irrespective of fault. *See* 44 Stat. 1426 § 4(b), 33 U.S.C. § 904(b). As this Court has noted:

> When the bill which became the Longshoremen's and Harbor Workers' Compensation Act was pending in Congress, the importance of the policy of compensation acts, and their advantages in providing for appropriate compensation in the case of injury or death of employees *without regard to the fault of the employer*, were distinctly recognized.

Nogueira v. New York, New Haven & Hartford Railroad Company, 281 U.S. 128, 136 (1930) (emphasis added). The Senate Committee Report on the Longshoremen's Act stated:

> The committee deems it unnecessary to comment upon the modern change in the relation between employers and employees establishing systems of compensation as distinguished from liability. Nearly every State in the Union has a compensation law through which employees are compensated for injuries occurring in the course of their employment *without regard to negligence on the part of the employer* or contributory negligence on the part of the employee. If longshoremen

law." *See* 44 Stat. 1426. This language was deleted by 1972 amendments to the Act. *See* Pub. L. No. 92-576, § 2(c), 86 Stat. 1251 (1972).

> could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation[.]

S. Rep. No. 973, 69th Cong., 1st Sess. 16 (emphasis added).[9]

Reference to cognate provisions of contemporaneous federal law, enacted under circumstances strikingly similar to those leading to enactment of Section 290, thus establishes that Congress understood "State workmen's compensation laws" to refer to non-fault based systems. Furthermore, the legislative history of Section 290 reveals that Congress did not depart from this understanding of "State workmen's compensation laws." H.R. 12599, the bill eventually enacted into law and codified as Section 290, was only one proposed response to the *Murray* conundrum. The Senate approved two other bills of similar purpose, and both adopted the no-fault approach. One such bill sought to rectify the problem by making state law applicable to federal contractors and by making the Longshoremen's Act applicable to the extent that state workers' compensation remedies were not available. *See* 80 Cong. Rec. 8724-25 (June 1, 1936) (reprinting S. 3238, as amended). The other Senate bill, S. 4671, would have amended 16 U.S.C. § 457 by adding the following proviso clause:

[9] It was not until 1958 that the Longshoremen's Act was amended to authorize the Secretary of Labor to promulgate and enforce, through imposition of fines, mandatory safety regulations. *See* Pub. L. No. 85-742, 72 Stat. 835 (1958), codified at 33 U.S.C. § 941; *see also* H.R. Rep. No. 2287, 85th Cong., 2d Sess., reprinted at 1958 U.S. Code Cong. & Admin. News. 3843.

> *Provided, however*, That in a State having a workmen's compensation act, such act shall apply with respect to an injury or death sustained under the jurisdiction of the State, *irrespective of whether such injury or death is due to the neglect or wrongful act of another*.

80 Cong. Rec. 8714 (June 1, 1936) (reprinting text of S. 4671) (emphasis added).[10]

In addition to the aforementioned indications, other circumstances reveal that Congress did not intend Section 290 to authorize imposition of the liability asserted here. The proviso clause of Section 290 demonstrates that Congress intended to authorize only a sharply limited state role and sought to protect broad federal regulatory authority over federal facilities. *See* 40 U.S.C. §290.

In addition, the bill which became Section 290 originally authorized application of state "safety" and "insurance" laws as well as those involving workers' compensation. *See* S. Rep. No. 2294, 74th Cong., 2d Sess. 2 (1936). This fact suggests that the drafters of Section 290 recognized a distinction between "workmen's compensation" laws, such as standard no-fault systems, and "safety" laws, such as the specific safety requirements imposed by Ohio. That the Senate eliminated language "subjecting Federal property to State safety and insurance regulations" on the grounds that "such provisions would not only produce conflicts of authority between State and Federal of-

[10] S. 4671 was sponsored by Senator Walsh of Massachusetts, identified by appellee as the main Senate sponsor of the bill which became § 290. *See* Appellee's Br. at 12 n.13.

ficers but would also mark a wide departure from the well-established principles that Federal officers should have complete charge of any regulations pertaining to Federal property," *id.*, is strong evidence that Congress did not intend to permit the type of safety regulation attempted in this case. The Senate Committee reasoned that "the principal reform" sought by the bill—i.e., to "furnish[] protection against death or disability to laborers and mechanics employed by contractors and other persons on Federal property" in the wake of *Murray*—"could be attained without the inclusion" of the safety and insurance clauses. *Id.* at 1-2. The deletion of the language authorizing application of state safety laws—such as the Ohio specific safety requirements—"strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).[11]

In short, the legislative background of Section 290 paints a clear picture. All circumstances relevant to construction of 40 U.S.C. § 290 establish that Congress did not authorize application to federal facilities of the specific safety requirements sought to be enforced in this case.[12]

[11] To similar effect, this Court quite recently noted that " '[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.' " *Immigration and Naturalization Service v. Cardoza-Fonseca*, ___ U.S. ___, ___, 107 S. Ct. 1207, 1219 (1987) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)).

[12] Appellee Miller's effort to discount the impact of Congress' decision to delete safety laws from Section 290 is unavailing.

3. The Atomic Energy Act Overrides Any Express Authorization In Section 290

Even assuming *arguendo* that Section 290 were construed to authorize imposition of the Ohio safety requirements under general circumstances, their application to the facility here involved is precluded by the terms of the Atomic Energy Act, the statute specifically at issue in this case. It is axiomatic that a specific statute is given precedence over a more general one. *See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc.*, ___ U.S. ___, ___, 107 S. Ct. 2494, 2499 (1987); *Busic v. United States*, 446 U.S. 398, 406 (1980); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

Under the Atomic Energy Act, the federal government, through the Department of Energy ("DOE"), is made "the exclusive owner" of nuclear production and utilization facilities such as the Portsmouth plant. *See* 42 U.S.C. § 2061(a). DOE is obligated by the statute to establish "standards and restrictions governing the . . . operation" of such facilities "in order to protect health and to minimize danger to life or property." *Id.* § 2201(i)(3). Further, Congress expressly directed that all contracts relating to operation of DOE-owned facilities must obligate the contractor "to comply with all safety . . . regulations which may be prescribed" by DOE. *Id.* § 2061(b)(2)(c). As discussed in great detail previously, *see* Appellant's Br. at 35-44, the Atomic Energy Act provides for a comprehensive scheme of *exclusive* federal safety regulation of federally owned nuclear production and utilization facilities which leaves no room for the state safety regulation attempted here. The Act's provision for exclusive federal regulation of occupational health and safety at federally owned facilities, moreover, has been affirmed by more than 40 years of consistent administrative interpretation of the Act.[13]

Accordingly, any authorization of the Ohio scheme made by Section 290 is effectively countermanded by

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Appellee contends that, through this action, Congress was concerned only with "direct" state safety regulation, as opposed to the "indirect" safety regulation accomplished by the Ohio system. *See* Appellee's Br. at 15-16. Even if the Ohio system constitutes "indirect regulation"—and it quite clearly constitutes direct regulation for reasons stated *supra*—there is nothing to suggest that Congress distinguished between direct and indirect state safety regulation. Rather, through its action Congress eliminated *any* authorization granting to state entities "the power and authority to apply" state safety laws "to all lands and premises owned or held by the United States of America."

[13] *Amici* National Conference of State Legislatures, *et al.* assert that 42 U.S.C. §2021(k), a savings clause provision of the Atomic Energy Act, authorizes the state regulation attempted here. *See* Br. at 26-28. This contention is clearly incorrect. Section 2021 merely authorizes the NRC to sign cooperation agreements permitting States to regulate certain *licensed* nuclear activities, and expressly does not address the exclusive DOE responsibility and authority for regulation of the operation of federally owned nuclear production and utilization facilities. See 42 U.S.C. §2021 (c). The plain purpose of Section 2021(k) was to establish that, irrespective of whether a state executed a cooperation argument, it retained "pre-existing state authority *outside the NCR's jurisdiction.*" *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 209-10 (1983) (emphasis added). Since regulation of health and safety at federally owned nuclear production and utilization facilities has always been with in the *exclusive* jurisdiction of the NRC and, currently, DOE, Section 2021(k) is immaterial to this case. Section 2021(k) simply "does not represent an affirmative grant of power to the States." *Pacific Gas & Electric Co.*, 461 U.S. at 210.

the terms of the Atomic Energy Act. As such, there is no "clear and unambiguous" authorization of state regulation and, pursuant to the *Hancock v. Train* doctrine, the Ohio additional awards scheme may not constitutionally be applied to regulate the conduct and operation of the federally owned Portsmouth plant.

D. The Ohio Additional Awards Scheme Cannot Be Applied In The Case At Bar

The final section of appellee Miller's brief contends that even if Section 290 is inapplicable, the Ohio additional awards scheme may nevertheless be applied. Appellee raises two principal arguments to that effect: first, that there is a strong presumption against complete preclusion of state compensatory remedies; and second, that the principle of *Hancock v. Train* does not govern this case. *See* Appellee's Br. at 17-20. Both arguments are flawed.

The presumption against preemption of state compensatory remedies is inapplicable to this case. That presumption applies only when *all* compensatory remedies are precluded. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1981) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."); *id.* at 263 (Blackmun, J., with Marshall, J., dissenting) ("it is inconceivable that Congress intended to leave victims with no remedy at all"). Here, of course, all compensatory remedies are not precluded: injured workers on federally owned nuclear production and utilization facilities may still obtain basic workers' compensation benefits in compensation for their injuries, as appellee Miller has done. It is only the additional penalty payment for violation of state safety regulations that may not be

imposed. Since compensatory remedies are available, the "strong presumption" raised by appellee is not implicated in this case. *See United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-64 (1954).[14]

Likewise, appellee's attempt to distinguish *Hancock v. Train* on the ground that the Ohio scheme involves "state regulation of government contractors" as opposed to "state regulation of federal facilities," Appellee's Br. at 19, is similarly misdirected. The broad rule set forth in *Hancock*—that "where 'Congress does not affirmatively declare its instrumentalities or property subject to regulation,' 'the federal function must be left free' of regulation"—admits of no such distinction. *See Hancock*, 426 U.S. at 179. The Ohio additional awards scheme at issue in this case would plainly subject to state regulation the "federal function" of nuclear production and utilization at the federally owned "instrumentality," the Portsmouth plant. As applied to this case, the Ohio scheme would govern how federal property may be utilized to perform its designated federal duties. The regulation involved here is simply different in kind from the imposition of state taxes or price controls upon suppliers and contractors of the federal government. *See, e.g., Penn Dairies, Inc. v. Pennsylvania Milk Control Comm'n*, 318 U.S.

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[14] Since the presumption is inapplicable, appellee's further arguments based upon that presumption, see Appellee's Br. at 21-28, are misplaced. Those arguments also are inappropriate because they rely upon a purported congressional authorization pursuant to 16 U.S.C. § 457 and 40 U.S.C. § 290 which, for reasons stated previously, does not exist.

261 (1943); *Alabama v. King & Boozer*, 314 U.S. 1 (1941).[15]

CONCLUSION

The Ohio scheme of additional awards for violation of specific safety requirements constitutes state regulation for purposes of the Supremacy Clause. Under the doctrine of *Hancock v. Train*, such regulation may be applied to the federally owned Portsmouth plant only through clear congressional command. Neither 40 U.S.C. § 290, nor any other federal statute, provide the unambiguous authorization of state regulation mandated by the Supremacy Clause.

For these reasons, and for the reasons stated in appellant's initial brief, the decision of the Court below should be reversed.

Respectfully submitted,

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[15] *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950), relied upon by appellee Industrial Commission of Ohio, Br. at 25, is inapposite to this case, since *Powell* concerns application of *federal* law—the Fair Labor Standards Act—to a contractor operating a federally owned facility.

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BRIEF

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No. 86-1172

In the Supreme Court of the United States

OCTOBER TERM, 1987

GOODYEAR ATOMIC CORPORATION, APPELLANT

v.

ESTO MILLER AND INDUSTRIAL COMMISSION OF OHIO

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT

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QUESTION PRESENTED

Whether the State of Ohio, consistently with the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, and the Atomic Energy Act of 1954, as amended, 42 U.S.C. (& Supp. III) 2011 *et seq.*, may subject a private contractor operating a federally-owned nuclear production facility to a supplemental workers' compensation award for violation of a specific state safety requirement.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	8
Argument:	
The Supremacy Clause prohibits a state from subjecting a private contractor operating a federally-owned nuclear production facility to a supplemental workers' compensation award for violation of a specific state safety requirement	11
I. Federal nuclear facilities are constitutionally immune from state safety regulation	12
II. The Ohio workers' compensation surcharge provision may not constitutionally be applied to a federal nuclear production facility	15
A. The Ohio surcharge provision as applied to appellant operates as a "regulation" of a federal function	16
B. Congress has not clearly authorized application of state safety regulations in the form of a workers' compensation surcharge to federal nuclear production facilities	20
C. Even if the surcharge provision is not deemed to be a "regulation" of the federal facility, it is nevertheless invalid under the Supremacy Clause because it interferes with the Department of Energy's exclusive control over its nuclear production facilities	23
D. The Ohio surcharge provision should be distinguished from general liability-imposing measures that states may apply to federal contractors	27
Conclusion	31

TABLE OF AUTHORITIES

Cases: Page

Alabama v. *King & Boozer*, 314 U.S. 1 (1941) 16
Bell v. *Maryland*, 378 U.S. 226 (1964) 11
Carson v. *Roane-Anderson Co.*, 342 U.S. 232 (1952) 5
Chicago & N.W. Transp. Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) 17
County of Suffolk v. *Long Island Lighting Co.*, 728 F.2d 52 (2d Cir. 1984) 12
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 12
Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) 2
EPA v. *State Water Resources Control Board*, 426 U.S. 200 (1976) 12
Graves v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939) 24
Hancock v. *Train*, 426 U.S. 167 (1976) 8, 9, 10, 12, 13, 16, 23, 24, 29
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 24
International Paper Co. v. *Ouellette*, No. 85-1233 (Jan. 21, 1987) 17
Jersey Central Power & Light Co. v. *Township of Lacey*, 772 F.2d 1103 (3d Cir. 1985), cert. denied, No. 85-959 (Feb. 24, 1986) 12
Johnson v. *Maryland*, 254 U.S. 51 (1920) 13, 24
Leslie Miller, Inc. v. *Arkansas*, 352 U.S. 187 (1956) 23
Maun v. *United States*, 347 F.2d 970 (9th Cir. 1965) 14
Mayo v. *United States*, 319 U.S. 441 (1943) 12
McCarty v. *McCarty*, 453 U.S. 210 (1981) 11
M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 12
Murray v. *Gerrick & Co.*, 291 U.S. 315 (1934) 20
Ohio v. *Thomas*, 173 U.S. 276 (1899) 12, 24
Pacific Gas & Electric Co. v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983) 1-2, 4, 12, 14
Paul v. *United States*, 371 U.S. 245 (1963) 10, 23

Cases—Continued: Page

Penn Dairies, Inc. v. *Milk Control Comm'n*, 318 U.S. 261 (1943) 16
Public Utilities Comm'n v. *United States*, 355 U.S. 534 (1958) 23
Rose v. *Rose*, No. 85-1206 (May 18, 1987) 11
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) 17, 25, 26
Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 8, 10, 12, 22, 27, 28, 30
State ex rel. Bailey v. *Krise*, 18 Ohio St. 2d 191, 249 N.E.2d 55 (1969) 18
State ex rel. Emmich v. *Industrial Comm'n*, 148 Ohio St. 658, 76 N.E.2d 710 (1947) 18
State ex rel. Holdosh v. *Industrial Comm'n*, 149 Ohio St. 179, 78 N.E.2d 165 (1948) 19
State ex rel. Kroger Co. v. *Industrial Comm'n*, 62 Ohio St. 2d 4, 402 N.E.2d 528 (1980) 18, 27
State ex rel. Rae v. *Industrial Comm'n*, 136 Ohio St. 168, 24 N.E.2d 594 (1939) 19
State ex rel. Whitman v. *Industrial Comm'n*, 131 Ohio St. 375, 3 N.E.2d 52 (1936) 18-19
Stewart & Co. v. *Sadrakula*, 309 U.S. 94 (1940) 21
United States v. *Georgia Public Service Comm'n*, 371 U.S. 285 (1963) 23
United States v. *Mississippi Tax Comm'n*, 412 U.S. 363 (1973) 21
United States v. *New Mexico*, 455 U.S. 720 (1982) .. 23, 24

Constitutions, statutes and regulations:

U.S. Const.:
Art. I, § 8, Cl. 17 20
Art. VI, Cl. 2 (Supremacy Clause) .....*passim*

Ohio Const. Art. II, § 35 .....7, 19, 21
Act of June 25, 1936, ch. 822, 49 Stat. 1938 20
Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 .. 1
Atomic Energy Act of 1954, 42 U.S.C. (& Supp. III) 2011 *et seq.* 2
42 U.S.C. 2013(c) 3
42 U.S.C. 2014(e) 2

Statutes and regulations—Continued: Page

42 U.S.C. 2014(q) 22
42 U.S.C. 2014(s) 3
42 U.S.C. 2014(v) 3
42 U.S.C. 2014(w)(i) 22
42 U.S.C. 2014(z) 2
42 U.S.C. 2014(aa) 2
42 U.S.C. 2014(cc) 4
42 U.S.C. 2018 ..... 4, 14, 22, 25
42 U.S.C. 2021 ..... 14, 28
42 U.S.C. 2021(a) 4
42 U.S.C. 2021(b) 4
42 U.S.C. 2021(b)(4) 13
42 U.S.C. 2021(c)(1) 4, 14
42 U.S.C. 2021(g) 4
42 U.S.C. 2021(k) 14, 22
42 U.S.C. 2061(a) 4
42 U.S.C. 2061(b) 3, 5, 14, 25
42 U.S.C. 2061(b)(2)(C) 5, 14, 25
42 U.S.C. 2071-2078 2
42 U.S.C. 2073-2074 3
42 U.S.C. 2091-2099 2
42 U.S.C. 2093-2094 3
42 U.S.C. 2111-2112 3
42 U.S.C. 2111-2114 2
42 U.S.C. 2131-2134 ..... 2, 3
42 U.S.C. 2161-2168 25
42 U.S.C. 2168 25
42 U.S.C. 2201 note 3
42 U.S.C. 2201(b) 5, 14, 25
42 U.S.C. 2201(i) 3, 14, 25
42 U.S.C. 2201(i)(3) 5
42 U.S.C. 2210 22
42 U.S.C. 2210(d) 22
42 U.S.C. 2210(m) 22

Occupational Safety and Health Act, 29 U.S.C. (& Supp. III) 651 *et seq.*:

29 U.S.C. 653(b)(1) 6, 28
29 U.S.C. 653(b)(4) 10, 27
29 U.S.C. 667 25

Statutes and regulations—Continued: Page

Pub. L. No. 86-373, § 1, 73 Stat. 688 4
Pub. L. No. 89-135, 79 Stat. 551 14
28 U.S.C. 1257(2) 11
40 U.S.C. 290 ..... 9, 10, 20, 21, 22, 28
42 U.S.C. 5814(b) 3
42 U.S.C. 5814(c) 3
42 U.S.C. 7151 3
Ky. Rev. Stat. Ann. § 342.165 (Michie 1983) 21
Mo. Ann. Stat. § 287.120(4) (Vernon Supp. 1987) 21
N.M. Stat. Ann. § 52-1-10 (1978) 21
N.C. Gen. Stat. § 97-12 (1979) 21
Ohio Admin. Code (1986):
§ 4121:1-5-03(D)(2) 7
§ 4121-3-20(I) 15
§ 4121-3-20(K)(3) 17
Ohio Rev. Code Ann. (Page 1980 & Supp. 1986):
§ 4121.13(B) (Supp. 1986) 7
§ 4121.13.1 26
§§ 4121.14-4121.17 26
§ 4121.47 (Supp. 1986) 15, 17
S.C. Code Ann. § 42-9-70 (Law. Co-op. 1985) 21
Wis. Stat. Ann. § 102.57 (West Supp. 1986) 21
29 C.F.R. 1910.28 6
48 C.F.R.:
Section 923.7002(b) 25
Section 952.223-71 25
Section 970.0404-2(c) 25
Section 970.5204-2 25

Miscellaneous:

80 Cong. Rec. (1936):
pp. 9180-9181 22
p. 9643 22
H.R. Rep. 2656, 74th Cong., 2d Sess. (1936) 20, 21, 22
H.R. Rep. 2181, 83d Cong., 2d Sess. (1954) 2, 3, 4, 5
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Miscellaneous—Continued: Page

Occupational Safety and Health Program for DOE Contractor Employees at Government-Owned Contractor-Operated Facilities, DOE No. Order 5483.1A (June 22, 1983) 5, 6
Safety Analysis and Review System, DOE Order No. 5481.1A (Aug. 13, 1981) 5
S. Rep. 2294, 74th Cong., 2d Sess. (1936) 20, 21, 22
S. Rep. 1211, 79th Cong., 2d Sess. (1946) 2, 3
S. Rep. 870, 86th Cong., 1st Sess. (1959) 4
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In the Supreme Court of the United States

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GOODYEAR ATOMIC CORPORATION, APPELLANT

v.

ESTO MILLER AND INDUSTRIAL COMMISSION OF OHIO

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT

INTEREST OF THE UNITED STATES

Ohio workers' compensation law provides for a special surcharge, supplementing the ordinary award, when an employee's injury is caused by his employer's violation of a specific state safety requirement. This case concerns the application of that law to an employer that, under contract with the federal government, operates a federally-owned, federally-supervised facility for the production of nuclear fuel. The United States has a strong interest in preserving the constitutional immunity from state regulation to which federal facilities and activities are entitled under the Supremacy Clause. This Court, prior to noting probable jurisdiction, invited the Solicitor General to express the views of the United States in this case.

STATEMENT

1. The Atomic Energy Act of 1946, ch. 724, 60 Stat. 755, established an absolute federal-government monopoly over nuclear energy. See *Pacific Gas & Electric Co.* v.

State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 206-207 (1983); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 63 (1978); H.R. Rep. 2181, 83d Cong., 2d Sess. 8 (1954); S. Rep. 1211, 79th Cong., 2d Sess. 9, 14 (1946). To encourage private involvement in the development of nuclear energy for peaceful purposes, the Atomic Energy Act of 1954, 42 U.S.C. (& Supp. III) 2011 *et seq.* (Atomic Energy Act or 1954 Act), ended that monopoly. The 1954 Act, which remains the basic statutory framework today, permitted private persons for the first time to use nuclear technology other than as federal contractors discharging governmental functions. The Act authorizes this private role, however, only under strict federal licensing and regulation.

The Act requires that a private party obtain a federal license from the Nuclear Regulatory Commission (formerly the Atomic Energy Commission)[1] before it may possess, handle, or use "special nuclear material," "source material," and "byproduct material" (42 U.S.C. 2014(e), (z) and (aa), 2071-2078, 2091-2099, 2111-2114). These are, respectively, the materials used in, processed in order to be used in, or produced by nuclear reactions.[2] The 1954 Act also requires that a private party secure a federal license before it may acquire or use a nuclear reactor or any other device capable of either utilizing or producing special nuclear material (42 U.S.C. 2131-2134). Licenses can be obtained for industrial, commercial, research, and therapeutic purposes (42 U.S.C. 2073-2074, 2093-2094, 2111-2112, 2131-2134).

[1] For the sake of simplicity, we will refer to the Nuclear Regulatory Commission (NRC) and its predecessor, the Atomic Energy Commission, as the Commission.

[2] "Special nuclear material" is material capable of sustaining a chain reaction, including plutonium and enriched uranium 233 and 235 (42 U.S.C. 2014(aa)). "Source material" is material from which the special nuclear materials are derived by processing, including uranium, thorium, and their ores (42 U.S.C. 2014(z)). "Byproduct material" includes radioactive material "yielded in or made radioactive by * * * utilizing special nuclear material" (42 U.S.C. 2014(e)).

This system of government licensing and regulation of private nuclear activities is distinct from and supplements the federal government's role as an operator of its own nuclear facilities. In fact, these two governmental roles are now played by two different agencies. The Nuclear Regulatory Commission (NRC) is responsible for the regulation and licensing of private licensees and also for licensing certain government activities not relevant here. The Department of Energy (DoE) is now responsible for the principal operational activities of the federal government, which are not subject to licensing requirements (42 U.S.C. 2014(s)). See 42 U.S.C. 2201(i), 2201 note (Note on Transfer of Functions), 5814(b) and (c), 7151.[3]

Among the latter activities is DoE's continuing ownership and operation of nuclear "production facilities"—facilities that can produce special nuclear material, the essential fuel for reactors, in a manner that may affect the public health or safety or in quantities significant to the national defense and security (42 U.S.C. 2014(v)). The 1954 Act specifically authorizes the government to produce nuclear fuel at such facilities (42 U.S.C. 2061(b)) so as "to make the maximum contribution to the common defense and security and the national welfare" (42 U.S.C. 2013(c)). See also H.R. Rep. 2181, *supra*, at 14; S. Rep. 1211, *supra*, at 14 The government has operated several such production facilities since World War II. These DoE plants are the only facilities in the United States that are capable of meeting the

[3] The responsibility for regulating licensees and for operating government facilities was originally unified in the Atomic Energy Commission. Although jurisdiction is now divided, the language of the Atomic Energy Act generally has not been changed to reflect that fact. See S. Rep. 93-980, 93d Cong., 2d Sess. 82-85 (1974) (summarizing which provisions apply to which agency).

needs of private licensees and of the military for nuclear fuel.[4]

Although the 1954 Act expressly preserves state regulatory authority over the generation, transmission, and sale of electric power (42 U.S.C. 2018), Congress in 1954 recognized no other role for the States with respect to regulation of nuclear energy. See *Pacific Gas & Electric Co., supra*, 461 U.S. at 207. In 1959, Congress carefully expanded the States' regulatory role (Pub. L. No. 86-373, § 1, 73 Stat. 688), providing that, upon a State's adoption of adequate safety standards, the Commission may enter into a cooperative agreement transferring to the State the power to regulate source material, byproduct material, and quantities of special nuclear material not sufficient to form a critical mass (*i.e.*, to sustain a chain reaction). See 42 U.S.C. 2021(a), (b), and (g). This cession of authority over certain materials, however, does not extend to "utilization facilities" (facilities, including power plants, that use special nuclear material (42 U.S.C. 2014cc)) or to production facilities. Rather, the 1959 amendments expressly require the Commission to retain responsibility for regulating the construction and operation of such facilities (42 U.S.C. 2021(c)(1)). See S. Rep. 870, 86th Cong., 1st Sess. 8, 9 (1959) (rejecting dual or concurrent regulation and stating that "[l]icensing and regulation of more dangerous activities

[4] The 1954 Act requires that DoE, on behalf of the United States, be the exclusive owner of all nuclear production facilities, with two exceptions—where the facilities are licensed by the Commission, and where they are engaged in research and are incapable of producing enough fuel to make an atomic weapon. 42 U.S.C. 2061(a). The second exception, by definition, does not cover facilities that can produce significant quantities of nuclear fuel. The first exception is more theoretical than practical, since there are in fact no privately-owned, licensed production facilities capable of making significant quantities of enriched uranium or of any other nuclear fuel. The requirement of DoE (originally, Commission) ownership of nuclear production facilities was intended to ensure civilian as opposed to military control of the atomic energy program (H.R. Rep. 2181, *supra*, at 14).

—such as nuclear reactors—will remain the exclusive responsibility of the Commission"). Thus, while carving out a modest role for state regulation of certain private activities, the 1959 amendments make no provision at all for state regulation of federally-owned facilities, such as the nuclear production facilities now under the jurisdiction of DoE.

Even before the system of private licensing was established in 1954, the federal government had entered into contracts with private companies to assist in or to carry out some federal atomic-energy operations. See *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232, 235 (1952). The 1954 Act continues this practice and, in particular, authorizes DoE to contract with private parties to operate its federally-owned production facilities (42 U.S.C. 2061(b)). The Department must maintain complete control over such facilities, however, and all contractors are subject to its direction and supervision (42 U.S.C. 2061(b)). See H.R. Rep. 2181, *supra*, at 14 ("In connection with its own production facilities, * * * the Commission is permitted to have the actual operation carried on by other persons under contract to it and under its direction and control."). In the exercise of control over such facilities, DoE has specific authority to set safety standards for the use and handling of radiological material at its facilities (42 U.S.C. 2201(b)), to regulate the operation of its facilities "in order to protect health and to minimize danger to life or property" (42 U.S.C. 2201(i)(3)), and to require contractor compliance with safety and security regulations (42 U.S.C. 2061(b)(2)(C)). Pursuant to this authority, the Department has issued a series of orders that set forth a comprehensive occupational safety and health program for federally-owned production facilities. See *Safety Analysis and Review System*, DOE Order No. 5481.1A (Aug. 13, 1981); *Occupational Safety and Health Program for DOE Contractor Employees at*

Government-Owned Contractor-Operated Facilities, DOE Order No. 5483.1A (June 22, 1983).[5]

2. This case involves the DoE nuclear production facility in Portsmouth, Ohio—the Portsmouth Gaseous Diffusion Plant, constructed in the early 1950s (J.S. App. 75a). The facility produces "special nuclear material" (enriched uranium) for both civilian and military uses. Aside from a federal facility in Paducah, Kentucky, the Portsmouth plant is the only operating uranium-enrichment facility in the Nation; and it is the only facility in the Nation that produces fuel that meets the needs of the Navy's nuclear ships and submarines (*id.* at 31a). The facility uses classified technologies, and a security clearance is required for full access to the plant. At the times relevant to this case, the facility was operated, under contract with DoE, by appellant Goodyear Atomic Corporation (*id.* at 1a). Goodyear was contractually obliged to comply with DoE safety standards, including a detailed standard for safe use of scaffolds. See 29 C.F.R. 1910.28, incorporated by reference in DOE Order No. 5483.1A, at I-1.

On July 30, 1980, Esto Miller, a maintenance mechanic employed by Goodyear at the Portsmouth plant, fell off a government-owned scaffold when his glove caught on a protruding bolt. He injured his ankle and heel. He applied to the Industrial Commission of Ohio for workers' compensation, for which Goodyear pays premiums to cover its Portsmouth employees. The claim was ap-

[5] The Department's non-radiological health and safety standards largely adopt and incorporate by reference standards developed by the Occupational Safety and Health Administration (OSHA). See DOE Order No. 5483.1A, at I-1. OSHA standards do not apply of their own force, because the OSHA statute excludes coverage of "employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health" (29 U.S.C. 653(b)(1)). The Secretary of Labor has recognized that this exception applies to government-owned, contractor-operated (so-called GOCO) facilities now under the jurisdiction of DoE (J.S. App. 53a-80a).

proved, and Miller received $9,000 in benefits (J.S. App. 10a).

Miller then filed an application to the Industrial Commission for a supplemental award of 15% to 50% of the benefits already received. Ohio law provides for such a surcharge (the state insurance fund recoups the money through an increase in the premium paid by the employer) where the injury is caused by the employer's failure to comply with any specific health or safety requirement imposed by the state legislature or the Industrial Commission. See Ohio Const. Art. II, § 35; Ohio Rev. Code Ann. § 4121.13(B) (Page Supp. 1986). Miller alleged that Goodyear had violated Ohio Admin. Code § 4121:1-5-03(D)(2)(1986), which provides, among other things, that "[e]xposed surfaces [on scaffolds] shall be free from sharp edges, burrs or other projecting parts."

3. The Department of Energy filed a brief amicus curiae opposing Miller's application to the Industrial Commission. The Department contended that the workers' compensation surcharge provision could not be applied to the Portsmouth plant consistently with the Atomic Energy Act and the Supremacy Clause (U.S. Const. Art. VI, Cl. 2). The Industrial Commission agreed, holding that "under the doctrine of federal preemption" the state scaffold safety requirement could not be applied to the federal facility (J.S. App. 15a). It therefore denied Miller's application without determining whether Goodyear had in fact violated the Ohio scaffold safety standard.

Miller filed a mandamus action in the Ohio Court of Appeals, seeking to compel the Industrial Commission to entertain his application. Goodyear was joined as a necessary party, but the federal government did not participate at that stage.[6] The court ruled that Congress had

[6] The federal government has initiated a related action in the United States District Court for the Southern District of Ohio, *United States* v. *Industrial Commission*, No. C2-85-1852. That action seeks an injunction against application of Ohio safety

not preempted the field of safety regulation of non-radiological hazards at nuclear production facilities. It further held that "specific safety regulations" that apply to Ohio employers generally "are equally applicable to an entity that contracts with the federal government for operation of a nuclear power facility owned exclusively by the federal government" (J.S. App. 14a). The court therefore issued the writ of mandamus to the Industrial Commission.

A divided Ohio Supreme Court affirmed (J.S. App. 1a-8a). Relying on *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), the majority broadly ruled that state safety regulations concerning non-radiological hazards are not preempted by the Atomic Energy Act (J.S. App. 1a-4a). The majority did not address Goodyear's separate argument (Br. 7-9) that, regardless of whether the Atomic Energy Act preempts state non-radiological regulation of private licensees, the Supremacy Clause immunizes federal facilities from state regulation because such regulation has not been authorized by Congress. Justice Wright, in dissent, agreed with Goodyear's Supremacy Clause argument. Relying on *Hancock* v. *Train*, 426 U.S. 167, 179 (1976), he concluded that congressional authorization would be required for application of state regulation to the federal facility and that no such authorization is present here (J.S. App. 4a-8a).

SUMMARY OF ARGUMENT

I. The broad ruling of the Ohio Supreme Court—that all state regulation of non-radiological hazards at federal as well as private facilities is lawful—is clearly incorrect under the Supremacy Clause. The Supremacy Clause has long been construed to render federal-government operations immune from any state regulation that is not clearly authorized by Congress. See *Hancock* v. *Train*, *supra*. There is no federal authorization for States to

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standards to DoE nuclear facilities. Cross-motions for summary judgment are pending, and the district court is holding the case in abeyance pending final disposition of the instant case.

regulate non-radiological safety hazards at federal nuclear production facilities.

II. The question actually before the Ohio court was not the broad one whether a State may regulate non-radiological safety at nuclear facilities. Rather, the narrow question was whether the workers' compensation award that Goodyear was required to pay in any event could permissibly be increased several thousand dollars for a violation of a state safety standard. That question is closer, but we nonetheless believe that the judgment of the Ohio Supreme Court is incorrect.

A. Although the Ohio surcharge provision is not literally cast as a "regulation," it should be treated as a regulatory provision for purposes of Supremacy Clause analysis. The surcharge sought to be imposed on appellant is designed to have a direct effect on the manner in which the federal facility is operated. Application of the surcharge is triggered by the violation of specific safety rules established by the Ohio legislature or by the state Industrial Commission; those rules are aimed at regulating employers' conduct of their businesses. As applied to appellant, the surcharge should therefore be treated as a "regulation" of the federal plant subject to the *Hancock* v. *Train* standard.

B. Congress has not provided in the Atomic Energy Act the unambiguous authorization required by *Hancock* v. *Train*. Nor has it done so in 40 U.S.C. 290, the statute that generally authorizes the application of workers' compensation laws to federal projects. The latter statute was not intended to permit federal facilities to be subjected to indirectly enforced state safety codes. Indeed, a provision that would have authorized the application to federal facilities of state safety laws was deleted from the bill that enacted this statute.

C. Even if the surcharge provision is not deemed a "regulation" of the federal facility, we think it nonetheless should be held invalid under the less demanding constitutional-immunity standards, akin to those of preemption law, that invalidate state laws that interfere with

federal operations. See, *e.g.*, *Paul* v. *United States*, 371 U.S. 245 (1963). Whether or not viewed as a direct regulation of the Portsmouth plant, the Ohio law, tied to specific regulatory standards, has unavoidable regulatory effects on the operation of the nuclear facility. Enforcement of the surcharge provision would force appellant, in operating the facility, to consult the possibly diverse commands of two regulatory authorities and to pay a monetary penalty for injuries if it were unwilling or unable to comply with Ohio's preferred safety rule. This result would be inconsistent with the exclusive control that the federal government has asserted over its own production facilities.

D. Neither the provision of the Occupational Safety and Health Act (OSHA) that preserves workers' compensation laws from preemption by OSHA (29 U.S.C. 653(b)(4)) nor this Court's discussion of general tort remedies in *Silkwood* v. *Kerr-McGee Corp.*, *supra*, requires a different result. The OSHA proviso does not apply to this case, because DoE exercises its own OSHA-type authority over its production facilities. Moreover, the proviso states only that workers' compensation laws are generally protected from preemption *by OSHA*; it does not save state laws, like the Ohio surcharge, that are invalid under the Supremacy Clause without regard to any particular preemptive statute. Finally, as noted in discussing 40 U.S.C. 290, the Ohio provision's regulatory character removes it from the class of general workers' compensation laws with which the OSHA proviso and 40 U.S.C. 290 are alike concerned.

This Court's decision in *Silkwood*, which upheld the availability of general tort remedies against the operator of a nuclear plant, likewise does not control the outcome here. The *Silkwood* case involved a private nuclear facility, not a federally-owned facility like the Portsmouth plant; the Supremacy Clause analysis of *Hancock* v. *Train*, which we believe governs here, thus had no application in *Silkwood*. The *Silkwood* decision, moreover, held only that general tort remedies were not preempted

by the Atomic Energy Act; the Court did not address measures, like the Ohio surcharge provision, that aim to compel compliance with a code of specific safety regulations.

ARGUMENT

THE SUPREMACY CLAUSE PROHIBITS A STATE FROM SUBJECTING A PRIVATE CONTRACTOR OPERATING A FEDERALLY-OWNED NUCLEAR PRODUCTION FACILITY TO A SUPPLEMENTAL WORKERS' COMPENSATION AWARD FOR VIOLATION OF A SPECIFIC STATE SAFETY REQUIREMENT

The broad pronouncement of the Ohio Supreme Court went far beyond the issues actually presented to the court and is squarely contrary to long-standing constitutional principles affording immunity to federal facilities from state regulation. The particular workers' compensation surcharge provision at issue in this case, though presenting a closer question, is also unconstitutional as applied to appellant.[7] The judgment of the Ohio Supreme Court is therefore incorrect[8] and should be reversed.[9]

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[7] Appellant Goodyear Atomic Corporation is no longer the contractor operating the Portsmouth facility. Appellant, however, remains liable for any surcharge that is eventually awarded by the Ohio Industrial Commission. The case, therefore, is not moot.

[8] In the brief that we previously submitted in response to the Court's invitation in this case, we suggested (at 18-20) that it was unnecessary for the Court to set the case for full briefing and argument, and that the decision of the Ohio Supreme Court should instead be vacated and remanded for consideration of the effect on its ruling of an intervening change in Ohio law. *Bell* v. *Maryland*, 378 U.S. 226, 238-241 (1964). In this brief, we assume that the Court will address the merits of the Ohio Supreme Court's ruling.

[9] The case is properly before this Court on appeal under 28 U.S.C. 1257(2). The Ohio Supreme Court upheld the application of the state workers' compensation surcharge provision against the contention that such application was unconstitutional under the Supremacy Clause. See *Rose* v. *Rose*, No. 85-1206 (May 18, 1987), slip op. 4 n.3; *McCarty* v. *McCarty*, 453 U.S. 210, 219 n.12 (1981); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 112-

I. FEDERAL NUCLEAR FACILITIES ARE CONSTITUTIONALLY IMMUNE FROM STATE SAFETY REGULATION

The Ohio Supreme Court broadly ruled that States are free to regulate non-radiological safety hazards at nuclear facilities. Whatever the correctness of that ruling with respect to private facilities,[10] as to which the decision below is pure dictum, the ruling is clearly incorrect as applied to a federally-owned facility carrying out a federal program. Beginning as early as *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), this Court has held that the activities and installations of the United States are exempt under the Supremacy Clause from direct state regulation, unless such regulation has been clearly and unambiguously authorized by Congress. *EPA* v. *State Water Resources Control Board*, 426 U.S. 200 (1976); *Hancock* v. *Train*, 426 U.S. 167, 178-179 (1976); *Mayo* v. *United States*, 319 U.S. 441 (1943); *Ohio* v. *Thomas*, 173 U.S. 276, 282-284 (1899). "[W]here 'Congress does not affirmatively declare its instrumentalities or property subject to regulation,' 'the federal function must be left free' of regulation." *Hancock* v. *Train*, 426 U.S. at 179 (quoting *Mayo* v. *United States*, 319 U.S. at 447, 448). The immunity applies even though the federal facility is managed by a private party under contract with the United States. Indeed, *Hancock* v. *Train* involved the Paducah, Kentucky, nuclear production facility, which is owned by the federal government and operated by a private contractor in the same manner as the Portsmouth plant at issue here. See 426 U.S. at 174 n.23.

Justice Wright correctly pointed out in dissent (J.S. App. 6a-7a) that there is no congressional authorization for States to regulate federally-owned nuclear production facilities like the Portsmouth plant. Indeed, the majority of the Ohio Supreme Court did not rule otherwise, since it erroneously thought that preemption analysis of the sort undertaken in *Silkwood*, which would be required for private facilities, similarly was required here.[11] Nor has appellee Miller contended that federal law affirmatively authorizes state regulation of federal nuclear facilities.

No such contention could plausibly be maintained. As we have noted, while the Atomic Energy Act provides for a limited state regulatory role in circumstances not present here—*e.g.*, where the Commission enters into a cooperation agreement permitting a State to regulate "special nuclear materials in quantities not sufficient to form a critical mass" (42 U.S.C. 2021(b)(4))—the Act no-

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113 (6th ed. 1986). The judgment below appears to be final, even though further proceedings before the Ohio Industrial Commission are contemplated, because the case falls within either the first or fourth category set forth in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 479, 482-483 (1975). As far as we can tell, the federal issue has been finally decided by the Ohio Supreme Court, there is no real doubt that the Industrial Commission would impose the surcharge on appellant, reversal by this Court would preclude further proceedings, and a serious erosion of federal policies is alleged.

[10] On that question, which raises a preemption issue, see *Silkwood*, 464 U.S. at 250-261; *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, *supra*; *Jersey Central Power & Light Co.* v. *Township of Lacey*, 772 F.2d 1103, 1111 (3d Cir. 1985), cert. denied, No. 85-959 (Feb. 24, 1986); and *County of Suffolk* v. *Long Island Lighting Co.*, 728 F.2d 52, 58 (2d Cir. 1984).

[11] The difference in analysis applicable to attempted state regulation of federal facilities, on the one hand, and private facilities, on the other, essentially reduces to a difference in the burden and quantum of proof. State regulation of federal facilities is presumptively invalid, and requires a clear showing of affirmative action by Congress to permit it; state regulation of private facilities is presumptively valid, and requires a showing of affirmative action by Congress (or by an agency) to preempt it. The federal-immunity and preemption issues, though obviously related, are quite distinct. As Justice Holmes noted in the former context (*Johnson* v. *Maryland*, 254 U.S. 51, 55 (1920)): "The cases upon the regulation of interstate commerce can not be relied upon as furnishing an answer. They deal with the conduct of private persons in matters in which the States as well as the general government have an interest and which would be wholly under the control of the States but for the supervening destination and the ultimate purpose of the acts. Here the question is whether the State can interrupt the acts of the general government itself."

where provides for state regulation of federal production facilities like the Portsmouth plant. To the contrary, the Act requires the federal government to retain authority for regulating the operation of all production facilities (42 U.S.C. 2021(c)(1)) and to retain control of contractors in their operation of DoE production facilities (42 U.S.C. 2061(b)). Indeed, the Act specifically empowers DoE to set safety standards at federally-owned facilities (42 U.S.C. 2201(b) and (i); see also 42 U.S.C. 2061(b)(2)(C)). In short, contrary to the Ohio Supreme Court's statement, direct state regulation of federal nuclear production facilities is clearly lacking congressional authorization and hence is invalid under the Supremacy Clause.[12]

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[12] Neither 42 U.S.C. 2021(k) nor 42 U.S.C. 2018, both of which preserve certain state authority from preemption by the 1954 Act, constitutes congressional authorization for state regulation of federal nuclear production facilities. Section 2021 authorizes the NRC to sign cooperation agreements permitting States to regulate certain *licensed* nuclear activities. See page 4, *supra*. Section 2021(k) says that "[n]othing in this [S]ection shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." As its language makes clear and this Court has pointed out, Section 2021(k) "does not represent an affirmative grant of power to the states." *Pacific Gas & Electric Co.*, 461 U.S. at 210.

Section 2018 preserves state authority over certain decisions regarding electric power. This provision, like Section 2021(k), by its terms merely preserves and does not grant any state power. Indeed, in a 1965 amendment to 42 U.S.C. 2018 (Pub. L. No. 89-135, 79 Stat. 551), Congress underscored its recognition of the immunity of federal activities from state regulation. The 1965 amendment was enacted to overrule a Ninth Circuit decision (*Maun* v. *United States*, 347 F.2d 970 (1965)) that had upheld a local government's effort to regulate the supply of electric power to a federal nuclear facility; Congress clarified Section 2018 to specify that the Act's reservation of authority over the generation of electric power applied only to *licensees* and did not "confer upon any Federal, State, or local agency any authority to regulate, control, or restrict any *activities of the Commission*" or of its successor, DoE. 42 U.S.C. 2018 (emphasis added). The Joint Committee on Atomic Energy explained that "there was no intention, by including [42 U.S.C. 2018] in the act, in any way to limit the sovereign

II. THE OHIO WORKERS' COMPENSATION SURCHARGE PROVISION MAY NOT CONSTITUTIONALLY BE APPLIED TO A FEDERAL NUCLEAR PRODUCTION FACILITY

Despite the breadth of the Ohio Supreme Court's reasoning, this case, as it arose and as it was presented to that court, did not involve a regulation imposed directly on the federal government or a regulation enjoining how the "instrumentalities or property" of the federal government are to be employed. Rather, the case involved the imposition of a monetary workers' compensation surcharge on Goodyear, a private party, for activities conducted under contract with and on behalf of the federal government.[13] The judgment appealed from could thus conceivably be defended on the theory that the imposition of this surcharge would not be an impermissible "regulation" of the Portsmouth plant. Indeed, it is on that alternative ground that appellee Miller has principally relied. See Mot. to Aff. 5-9. Contrary to that view, we believe that the monetary surcharge is tantamount to a "regulation" and as such is invalid; we also believe that the surcharge is invalid even if it is not deemed a "regulation."

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immunity possessed by the [Atomic Energy Commission] as a Federal agency, by virtue of the supremacy clause of article VI of the U.S. Constitution" (H.R. Rep. 567, 89th Cong., 1st Sess. 5 (1965)). See also *id.* at 5-6, 9-10.

[13] The Ohio surcharge provision has changed in several important respects since the Supreme Court of Ohio rendered its decision in this case. One such change, effective August 22, 1986, requires the Ohio Industrial Commission, upon finding a violation of a safety standard in deciding a claim for a surcharge, to issue an order directing the employer to comply with the safety standard. See Ohio Rev. Code Ann. § 4121.47 (Page Supp. 1986); Ohio Admin. Code § 4121-3-20(I) (1986); J.S. App. 46a-48a. This provision would plainly be invalid as applied to appellant, since it would constitute a direct state regulation of the federal facility. This new provision is not at issue at this stage of this case; as we explained in our earlier brief (at 18-19), it is not entirely clear whether the provision would apply if the case returns to the Ohio Industrial Commission.

A. The Ohio Surcharge Provision As Applied To Appellant Operates As A "Regulation" Of A Federal Function

This Court's decision leading up to and including *Hancock* v. *Train* establish that state regulation of federal instrumentalities, or of the use of federal property for federal purposes, is invalid under the Supremacy Clause in the absence of unambiguous congressional authorization. See page 12, *supra*. On the other hand, private parties are not immunized from generally applicable state laws simply because they happen to be dealing with the United States. As this Court has observed (*Hancock* v. *Train*, 426 U.S. at 179-180), the Supremacy Clause does not entail the presumptive invalidity of all state regulations of private parties that "may touch the activities of the Federal Government." See, *e.g.*, *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U.S. 261, 269-271 (1943) (milk price regulations governing sellers of milk are applicable to sales of milk to the United States); *Alabama* v. *King & Boozer*, 314 U.S. 1, 8-9 (1941) (sales tax may be imposed on purchases by a private person acting as a construction contractor for the United States). This limitation on the *Hancock* immunity principle recognizes that when the United States enters the marketplace to purchase goods or services, the supplier presumptively remains subject to the rules that would generally apply when dealing with other customers, even if the federal government is incidentally affected.

Although the Ohio surcharge provision does not directly mandate specific federal conduct, it should be treated as a regulation of a federal-government activity and hence, under *Hancock* v. *Train*, require congressional approval to be sustained as applied in this case. The surcharge provision is, first of all, clearly regulatory in its immediate effects. By exacting a damages penalty for the violation of specific safety standards, the provision has the immediate effect of inducing or coercing appellant to conduct its business in a particular way—to bring its activities into compliance with Ohio's specific

safety requirements. The activities thus regulated, moreover, are not mere private activities, with an incidental effect on the United States by virtue of higher costs incurred as a purchaser in the marketplace. Rather, the conduct regulated is itself the federal contractor's carrying out of a federal function, *i.e.*, its use of federal property (including the government-owned scaffold) for federally-defined purposes (to operate the Portsmouth plant for the production of nuclear fuel). This is the constitutional equivalent of an unadorned command about how to operate the federal facility.

The fact that Ohio's safety standards are enforced by a monetary award payable to an injured worker, rather than by injunction or criminal liability or even by a fine paid to the State,[14] does not alter the regulatory character of the law or the constitutional analysis. As this Court has pointed out (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)), "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." See also *International Paper Co.* v. *Ouellette*, No. 85-1233 (Jan. 21, 1987), slip op. 16 n.19. Thus, a state law that has a direct regulatory effect on a federal operation must be treated as a regulation, even if, in form, it merely creates a damages remedy or other monetary incentive to engage in or refrain from specified conduct. See *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317-318 (1981) (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U.S. at 243) ("a court's concern is necessarily with 'the nature

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[14] Effective August 22, 1986, the Ohio law requires an assessment of a monetary "civil penalty," in an amount up to $50,000, against any employer that is found to have committed two violations of specific safety standards in a 24-month period. See Ohio Rev. Code Ann. § 4121.47 (Page Supp. 1986); Ohio Admin. Code § 4121-3-20(K)(3) (1986); J.S. App. 49a-51a. This provision is not at issue in this case.

of the activities which the States have sought to regulate, rather than on the method of regulation adopted' ").

The line that separates state laws having "direct" regulatory effects from those having "incidental" regulatory effects is seldom easy to draw. Several features of the Ohio surcharge provision, however, distinguish it from general compensatory remedies (such as tort remedies or the basic workers' compensation award) and show that the Ohio law, as applied here, has a direct and intended regulatory effect on the federal plant. These features include the role that the surcharge plays in the Ohio workers' compensation scheme, the circumstances that must be present before it may be invoked, and the Ohio courts' characterization of it.

First, the surcharge is, by definition, not part of the ordinary package of compensatory relief provided injured employees. Award of the surcharge, moreover, is not triggered by any special circumstances (such as the employee's need) demonstrating that the ordinary measure of compensation is inadequate. Rather, it is triggered solely by deficiencies in the employer's conduct. While the surcharge is paid to the injured employee rather than to the State, it is plainly designed to regulate the employer's conduct by inducing him to conform his conduct to the prescribed safety standards. Indeed, the Ohio Supreme Court has long made clear that, although the surcharge "is compensation so far as the injured employee is concerned," it is "of a penal nature as to the employer" (*State ex rel. Emmich* v. *Industrial Comm'n*, 148 Ohio St. 658, 668, 669, 76 N.E.2d 710, 715 (1947). "The imposition of an additional award," the Ohio Court has stated, "acts as a deterrent to every employer from omitting compliance with legal specific safety requirements, and, in that respect, the additional award becomes compensation in the nature of a penalty" (148 Ohio St. at 669, 76 N.E.2d at 715). See also *State ex rel. Kroger Co.* v. *Industrial Comm'n*, 62 Ohio St. 2d 4, 6, 402 N.E. 2d 528, 530 (1980); *State ex rel. Bailey* v. *Krise*, 18 Ohio St. 2d 191, 198, 249 N.E.2d 55, 60 (1969); *State*

ex rel. Whitman v. *Industrial Comm'n*, 131 Ohio St. 375, 379, 3 N.E.2d 52, 53 (1936).

Not only does application of the surcharge provision focus solely on the employer's conduct, but the standards by which the employer's conduct is judged are, by the terms of the surcharge provision (Ohio Const. Art. II, § 35), set by the legislature or by the Industrial Commission, an administrative agency. In this respect, the surcharge provision resembles a formally-promulgated regulation and is distinguished from general compensatory relief, such as the basic worker's compensation award (generally imposed without regard to the employer's fault) and tort remedies (generally imposed by reference to common-law standards of care).

In addition, and perhaps of critical importance, the safety standard whose violation triggers a surcharge award must be "specific." As the Ohio courts have long made clear, this "specificity" requirement is not satisfied by general tort-law standards, by laws defining a "general course of conduct, or [by] those general duties and obligations of care and caution which flow from the relation of employer and employee, and which rest upon each member of the community for the protection of the others" (*State ex rel. Rae* v. *Industrial Comm'n*, 136 Ohio St. 168, 171-173, 24 N.E.2d 594, 596-597 (1939)). The "specificity" requirement, rather, is met only by laws that are sufficiently definite and precise to "forewarn the employer" (136 Ohio St. at 173, 24 N.E.2d at 597) and "plainly to apprise an employer of his legal obligations toward his employees" (*State ex rel. Holdosh* v. *Industrial Comm'n*, 149 Ohio St. 179, 181-182, 78 N.E. 2d 165, 166 (1948)).

In short, the fact that the Ohio provision is intended to influence employers' conduct in a specific, clearly defined, regulatory manner could not be clearer. As applied to an employer using federal property to carry out a federal function, therefore, the surcharge provision, for purposes of Supremacy Clause analysis, should be deemed a "regulation" of the federal facility subject to the principle of *Hancock* v. *Train*.

B. Congress Has Not Clearly Authorized Application Of State Safety Regulations In The Form Of A Workers' Compensation Surcharge To Federal Nuclear Production Facilities

Under the principle of *Hancock* v. *Train*, the Ohio surcharge provision cannot constitutionally be applied to the Portsmouth plant because Congress has not clearly subjected the facility to that mode of state regulation. We have shown above (at pages 13-14) that nothing in the Atomic Energy Act delegates to States general authority to regulate federal nuclear facilities by ordering compliance with safety standards. It is equally clear that nothing in the Act affirmatively authorizes States to award damages or to impose other monetary sanctions for violations of such safety standards at federal facilities.

The only reasonably arguable source of such congressional authorization would be 40 U.S.C. 290, to which the Ohio Supreme Court did not refer. That section, which was enacted in 1936 (Act of June 25, 1936, ch. 822, 49 Stat. 1938), expressly grants States the authority to apply their "workmen's compensation laws" to

> all lands and premises owned or held by the United States of America * * * and to all projects, buildings, constructions, improvements, and property belonging to the United States of America * * * in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

The language and legislative history of this provision make clear that it is addressed to federal enclaves, areas over which the United States has assumed exclusive jurisdiction under U.S. Const., Art. I, § 8, Cl. 17. See S. Rep. 2294, 74th Cong., 2d Sess. (1936); H.R. Rep. 2656, 74th Cong., 2d Sess. 1936).[15] But the provision, by

[15] The provision was enacted in response to this Court's decision in *Murray* v. *Gerrick & Co.*, 291 U.S. 315 (1934), which held that a state workers' compensation law enacted after the federal government acquired exclusive jurisdiction over an area could not constitutionally be applied in that area. See *United States* v. *Mississippi Tax Comm'n*, 412 U.S. 363, 369-372 (1973) (state laws enacted after the United States acquires exclusive jurisdiction do not apply to the federal enclave; pre-acquisition state laws continue to apply unless they are inconsistent with federal objectives); *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 99-100 (1940) (same). This Court's holding provoked congressional concern that employees of private contractors at federal projects in federal enclaves were without the protection of state workers' compensation laws. See S. Rep. 2294, *supra*, at 1-2; H.R. Rep. 2656, *supra*, at 1-2.

its language and policy, a fortiori authorizes the application of state workers' compensation laws to federal facilities, like the Portsmouth plant, that are not federal enclaves.

The authorization embodied in 40 U.S.C. 290, however, should not be read to permit a workers' compensation *surcharge* of the sort involved here. Although a few States, including Ohio, had such provisions at the time 40 U.S.C. 290 was enacted,[16] the legislative history of the statute contains no mention of those obviously atypical provisions. Moreover, Congress was attempting in 1936 to fill a "conspicuous gap" in the law left by the inapplicability of *any* mechanism for compensating injured employees (S. Rep. 2294, *supra*, at 1). A surcharge, like Ohio's, that provides for an award over and above what is normally deemed sufficient compensation for a particular injury, and which is designed to induce employer compliance with a specific safety regulation, fills no such gap in compensatory remedies. There is no reason to deduce from Congress's concern about ensuring

[16] By the end of 1936, seven States apparently had statutes providing for workers' compensation surcharges based on violations of safety regulations or failure to provide required safety devices. See 2A A. Larson, *The Law of Workmen's Compensation* § 69.10, at 13-199 to 13-203 (1987). For the current versions of these statutes, see Ky. Rev. Stat. Ann. § 342.165 (Michie 1983); Mo. Ann. Stat. § 287.120(4) (Vernon Supp. 1987); N.M. Stat. Ann. § 52-1-10 (1978); N.C. Gen. Stat. § 97-12 (1979); Ohio Const. Art. II, § 35; S.C. Code Ann. § 42-9-70 (Law. Co-op. 1985); Wis. Stat. Ann. 102.57 (West Supp. 1986).

a source of compensation for injured employees a legislative intent to permit enforcement, by injunction or damages or other means, of state safety standards at federal projects.

Indeed, the legislative history shows that Congress did not intend state safety laws to apply to federal projects. The House version of the bill that became 40 U.S.C. 290 expressly provided for application to federal projects, not only of workers' compensation laws, but also of state "safety" and "insurance" laws. (H.R. Rep. 2656, *supra*, at 1). But the Senate amended the bill "by striking out all provisions subjecting Federal property to State safety and insurance regulations" (S. Rep. 2294, *supra*, at 2). In so doing, the Senate Committee recognized the "well-established principle that Federal officers should have complete charge of any regulations pertaining to Federal property" (*ibid.*). The Senate version became the law (80 Cong. Rec. 9180-9181, 9643 (1936)). Accordingly, 40 U.S.C. 290, the only arguable source of the constitutionally necessary authorization, cannot be read to authorize application to federal facilities of a workers' compensation surcharge provision that has the purpose and effect of enforcing specific state safety regulations.[17]

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[17] As we have explained (note 12, *supra*), neither 42 U.S.C. 2021(k) nor 42 U.S.C. 2018, which preserve limited state authority in the nuclear field, authorizes the States to regulate safety at federal nuclear production facilities. Nor does 42 U.S.C. 2210, whose application to private licensees was discussed in *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. at 251-252 & n.12, provide the necessary authorization. That Section states that DoE may indemnify contractors like appellant for certain liabilities arising from their activities (§ 2210(d)) and that DoE may require such contractors to waive certain defenses (§ 2210(m)). But the section merely assumes that contractors may incur liabilities in the course of discharging duties on the government's behalf; it does not, expressly or by clear implication, independently authorize the imposition of liability. Section 2210, moreover, permits indemnification only against "the risk of public liability" (§ 2210(d)), a term that is defined to exclude workers' compensation liability (§ 2014(w)(i)), and only in the case of a "nuclear incident" (§§ 2210(d), 2014(q)). In short, nothing in Section 2210 indicates—certainly not with the

C. Even If The Surcharge Provision Is Not Deemed To Be A "Regulation" Of The Federal Facility, It Is Nevertheless Invalid Under The Supremacy Clause Because It Interferes With The Department Of Energy's Exclusive Control Over Its Nuclear Production Facilities

If the surcharge provision is not deemed a "regulation" of the Portsmouth plant for purposes of the *Hancock* v. *Train* analysis, the mere absence of congressional authorization, without more, would not dictate the invalidity of that provision. The provision would, however, still be subject to the less demanding immunity principle that protects the federal government even against the indirect effects of certain state measures imposed on other persons. Where a state law does not directly regulate the use of federal property for a federal function, but applies to private parties in their dealings with the United States, this Court's decisions, while not stating a clear rule, generally have undertaken an inquiry akin to that in preemption cases. The Court has asked, in other words, whether the state law in any way frustrates or interferes with federal interests or programs, if only by invading a field claimed exclusively by the federal government or by imposing burdens that hamper progress toward federal goals. *E.g.*, *United States* v. *Georgia Public Service Comm'n*, 371 U.S. 285 (1963); *Paul* v. *United States*, 371 U.S. 245 (1963); *Public Utilities Comm'n* v. *United States*, 355 U.S. 534 (1958); *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956).[18]

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clarity required by *Hancock* v. *Train*, *supra*—that Congress intended to permit States to subject federal nuclear production facilities to indirectly-enforced safety codes.

[18] In *United States* v. *New Mexico*, 455 U.S. 720 (1982), this Court held that a nondiscriminatory state tax, absent congressional displacement, generally is unlawful under the Supremacy Clause only if it is directly imposed on the federal government or its alter ego. The Court, however, has not adopted that rigid rule where state regulation, as opposed to state taxation, is at issue; in the former context, the indirect effects on the federal government of a regulation directed at third parties are tested for consistency

Although the Ohio surcharge provision would present a closer question under this preemption mode of analysis, we think that the provision's application to appellant would nonetheless be unlawful. We do not suggest, of course, that the Ohio Industrial Commission's award of a $4,500 surcharge in this particular case would actually present "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted)). Nor do we suggest that the investigation required to establish a violation in this case, or even a direct regulatory command that no bolts protrude from federal scaffolds, would literally be incompatible with the efficient operation of the Portsmouth plant. Rather, the incompatibility of the surcharge provision with the federal

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with federal programs. Nor has the Court presumed the validity of all non-tax measures whose "legal incidence" falls on a party other than the United States. For example, federal employees are presumptively immune from state regulation of their federal activities (*Ohio* v. *Thomas*, *supra*; *Johnson* v. *Maryland*, *supra*), though they are not immune from state taxation of their federal salaries (*Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939)). And in *Hancock* v. *Train*, *supra*, the Court held flatly that the federal nuclear production facility could not be subjected to a state permit requirement (426 U.S. at 198-199), with no hint that the Court's analysis depended on whether the State imposed the requirement on the federal government itself or on the federal contractor operating the facility. See also 426 U.S. at 174 n.23 (noting that the State sought "to secure a permit application from the AEC or its contractor").

The different treatment of regulatory and tax cases is appropriate. A generally-applicable state tax like that involved in *New Mexico* is not designed to coerce or induce specified conduct, but merely collects a fee based on "commercial activities carried on for profit" from "distinct [non-government] entities pursuing private ends" (*New Mexico*, 455 U.S. at 734-735, 739 (original quotation marks omitted)). Such a tax represents but an ordinary cost of doing business in our economy, and its imposition therefore does not offend the sovereignty and supremacy principles embodied in the Supremacy Clause. Those principles are offended, however, and there is a substantial intrusion on federal government operations, when a State sets standards of conduct that, whatever the enforcement mechanism, directly affect the execution of federal functions.

operation, which arises both from the indisputable regulatory effects of the provision and the inevitable consequences of its enforcement, exists on a more general level. What this Court said in a related context should apply here: "It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. [But] [t]o sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. at 247.

Federal law, we think, establishes exclusive federal control over DoE's nuclear production facilities. In addition to the Supremacy Clause's grant of presumptively exclusive federal authority (see pages 12-13, *supra*), the Atomic Energy Act requires federal control of federal production facilities (42 U.S.C. 2061(b)) and recognizes those facilities' sovereign immunity (42 U.S.C. 2018; see note 14, *supra*). The Act also grants DoE the authority to set safety standards (42 U.S.C. 2201(b) and (i)) and to require contractor compliance with safety standards (42 U.S.C. 2061(b)(2)(C)). DoE has implemented those provisions by adopting, and requiring contractors to comply with (48 C.F.R. 923.7002(b), 952.223-71, 970.5204-2), occupational health and safety standards that are so comprehensive that DoE has been exempted from OSHA (see pages 5-6, *supra*).[19] Further, the Act directs DoE to exercise rigorous control over access to information about a production facility like the Portsmouth plant (see 42 U.S.C. 2161-2168), forbidding, in particular, the unauthorized dissemination of even unclassified information about the design of such facilities (42 U.S.C. 2168; see also 48 C.F.R. 970.0404-2(c)). Read in light of the original federal-government monop-

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[19] Because the DoE standards include a scaffold standard, direct application of the Ohio scaffold safety standard at issue in this case might well be preempted under OSHA's preemption provision (29 U.S.C. 667), if it applied.

oly over atomic energy, as well as the national security functions of and classified technologies used in plants like the Portsmouth facility, this scheme effectively decrees that there should be only one "law-making source[]"—the federal government—for the operators of federal nuclear production facilities. Cf. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. at 247.

The Ohio surcharge provision, even if it is not deemed a literal "regulation" of the federal facility, would inevitably require federal contractors to serve two masters. The provision must be judged not by the isolated effects of individual monetary awards but by the cumulative effect of the provision as a whole. Federal contractors would be forced to examine Ohio's detailed code of safety regulations (which change regularly) to determine which may be followed without impairing federal obligations. Prudence would dictate that compliance be over-inclusive, to avoid the costs of litigating disputed determinations. Contractors would also have to determine, every time a surcharge claim is made, just how much of the extensive investigatory apparatus available to the State, including on-site inspections, subpoenas of documents, and compulsory attendance of witnesses (see Ohio Rev. Code Ann. §§ 4121.13.1, 4121.14-4121.17 (Page 1980)), may be deployed without impairing federal security-related interests. We think it beyond question that federal contractors in this situation would necessarily conduct themselves as if they were subject to two regulatory authorities; in many situations, DoE's interests would be adverse to those of the State, and contractors would be caught in a true dilemma. That result, we think, would be inconsistent with the exclusive control that Congress has vested in DoE over federal nuclear production facilities. Indeed, DoE's exclusive control over such facilities has so long been taken for granted that this case is apparently the first instance, in more than 40 years, in which a State has attempted to impose on a federal contractor the type of sanction involved here.

D. The Ohio Surcharge Provision Should Be Distinguished From General Liability-Imposing Measures That States May Apply To Federal Contractors

Two arguments—based on the fact that the Ohio surcharge provision is part of a workers' compensation law that, on its face, only imposes monetary liability for damages—exert some force contrary to our position and warrant separate discussion. The first argument derives from 29 U.S.C. 653(b)(4), which generally provides that OSHA does not preempt state workers' compensation laws. The second argument derives from *Silkwood* v. *Kerr-McKee Corp.*, *supra*, which held that tort suits against NRC licensees are not inconsistent with the exclusive regulatory role of the federal government. Neither of those arguments is persuasive.

1. The workers' compensation savings provision of the Occupational Safety and Health Act, 29 U.S.C. 653(b)(4), states:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

If the OSHA statute applied here, this savings proviso on its face could conceivably be construed to encompass and thus to preserve the Ohio surcharge provision. See *State ex rel. Kroger Co.* v. *Industrial Comm'n*, 62 Ohio St. 2d 4, 402 N.E.2d 528 (1980). For several reasons, however, the OSHA provision cannot validate the Ohio surcharge.

First, the OSHA statute does not apply to the Portsmouth facility, because DoE is exercising its own OSHA-type authority at the plant (see pages 5-6, *supra*). Second, the OSHA savings provision does no more than disclaim the preemptive effect *of OSHA*; it does not purport to save a state measure that is invalid for other reasons.

As we have explained, the Ohio surcharge provision is invalid as applied to appellant because it acts to regulate a federal facility without express congressional authorization, and hence is invalid under the Supremacy Clause wholly apart from the effect of any preemptive federal statute. At most, the OSHA proviso might suggest that DoE's own occupational health and safety code, which substitutes for OHSA at the Portsmouth plant, should be given relatively little weight in a strict preemption analysis, should such an analysis be undertaken here.

Third, even if the OSHA savings proviso did apply here, it is not obvious that it would operate to save the Ohio workers' compensation *surcharge*. The application of workers' compensation laws to federal facilities generally is provided for in 40 U.S.C. 290; as we have already explained (pages 21-22, *supra*), that section should not be read to authorize the application of the Ohio surcharge, an essentially regulatory provision designed mainly to coerce specific employer conduct rather than to make injured employees whole. If the surcharge is not saved by 40 U.S.C. 290, which is directly applicable to this case, there is little reason to think that it could be saved by the OSHA proviso, which is relevant only by analogy.[20]

2. This Court held in *Silkwood* (464 U.S. at 249-258) that state tort law, including the authority to award punitive damages, was not preempted by the Atomic Energy Act. The Court reasoned that Congress, even while it recognized an exclusive federal regulatory role over nuclear facilities, did not intend to displace state

[20] Any application of the OSHA proviso to a federal nuclear production facility, moreover, would have to take into account its distinctive characteristics, including those bearing on national security. The Secretary of Labor has recognized DoE's special role. In addition, the OSHA statute itself makes special provision for certain nuclear activities. The statute (29 U.S.C. 653(b)(1)) specifically excludes from its coverage not only those employees who are covered by OSHA-type standards prescribed by other federal agencies, but also those covered by standards prescribed by state agencies acting under 42 U.S.C. 2021.

tort law, notwithstanding its incidental regulatory effects. Workers' compensation laws, of course, are traditionally a substitute for state tort law, and the immediate effect of an award under the Ohio law at issue here is simply to require a private party to pay money to an injured employee.

This Court's reasoning in *Silkwood* does not apply to the situation involved here, and the holding in *Silkwood* should not be extended to this context. To begin with, *Silkwood* involved a private facility, carrying on private activities with private property, albeit with federal permission. The question in *Silkwood* was thus whether otherwise applicable state law had been preempted by Congress. This case, by contrast, involves a federal facility, carrying out a federal mission with federal property. Under *Hancock* v. *Train*, *supra*, the constitutional inquiry relevant here is thus whether Congress has clearly and affirmatively authorized the safety regulation that the Ohio surcharge is designed to accomplish. We think it clear that Congress has not authorized this mode of state regulation, and hence that the surcharge should be invalidated under the Supremacy Clause without the need to engage in a *Silkwood* preemption analysis.

Further, this Court in *Silkwood* held only that Congress had preserved general tort law from preemption. The Court did not discuss the availability of other general compensatory remedies, and it certainly did not decide whether Congress had intended to preserve specific regulatory provisions of the sort involved here. An award under the Ohio surcharge provision, as the Ohio courts have explained (see page 19, *supra*), does not and cannot turn on general tort principles. Rather, it is tied directly to the violation of a specific state safety standard. When one considers the enforcement role of the surcharge provision as distinguished from isolated monetary awards under it, the provision must be deemed regulatory in effect. This distinction is critical for two reasons.

First, whereas the Court concluded in *Silkwood* that Congress understood even punitive damages to be pre-

served as a traditional and integral part of the general tort law that Congress left unimpaired by the Atomic Energy Act (464 U.S. at 255), there is no evidence to suggest that Congress understood indirect enforcement of specific regulatory guidelines like Ohio's to stand on analogous footing.[21] Second, general tort law and the Ohio surcharge provision have quite different effects on employers. The former imposes on employers no duties that an ordinarily responsible employer would not already assume, viz., the duty to operate his business with due care. The Ohio surcharge provision, by contrast, directly influences employers' conduct, setting detailed safety standards enforced by the threat of a monetary penalty if a violation causes injury. Because the Ohio standards are by no means identical to those promulgated by DoE, the surcharge provision, unlike general tort law, compels an employer to serve two regulatory masters. The surcharge provision thus invades federal authority, whereas even the punitive-damages component of tort law does not.

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[21] The *Silkwood* Court noted that preemption of all tort remedies would leave a conspicuous gap in compensatory relief (464 U.S. at 251). The Ohio workers' compensation surcharge does not fill any such gap: even without it, injured employees still have available to them the presumably full compensation provided by the basic award; and DoE can and does regulate occupational safety and health hazards.

CONCLUSION

The judgment of the Ohio Supreme Court should be reversed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

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No. 86-1172

IN THE

Supreme Court of the United States

October Term, 1987

GOODYEAR ATOMIC CORPORATION,
Appellant,

v.

STATE EX REL. ESTO MILLER
Appellee.

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND BRIEF FOR THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION AS AMICUS CURIAE SUPPORTING THE APPELLEE

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No. 86-1172

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COMES NOW the Oil, Chemical and Atomic Workers International Union, by and through its attorneys, the Law Offices of McKendree & Toll, and files the with Motion for Leave to File Amicus Brief pursuant to Rule 36.3 of the Rules of this Court, and as grounds therefor would state as follows:

1. The Oil, Chemical and Atomic Workers International Union, (hereinafter "OCAW") is the exclusive bargaining agent of employees working throughout the petroleum, nuclear production and energy industries, in general. The OCAW represented employees at the Portsmouth Gaseous Diffusion Plant located near Piketon, Ohio, a nuclear production facility owned by the United States and managed by Appellant Goodyear Atomic Corporation (hereinafter "Goodyear"). Appellee Esto Miller (hereinafter "Miller") was a member of the OCAW at the time of his employ with Goodyear Atomic.

The OCAW's interest in this case is in ensuring that workers' compensation laws enacted to provide employees their sole and exclusive remedy against employers for on-the-job injuries, often caused by the employer's gross negligence and failure to provide a safe work place, are enforced and applied to adequately compensate these employees. In the within case, the Supreme Court of the State of Ohio recognized the right of Miller to an increased award for his on-the-job injury. The OCAW's interest is in seeing that Goodyear Atomic is unsuccessful in attempting to divest Miller of his workers' compensation benefits. Preserving these benefits is critical, particularly for employees working in and around highly dangerous and volatile areas.

2. The OCAW will present arguments concerning questions of law surrounding the preemption doctrine as well as the alleged "regulatory effect" of the supplemental workers' compensation award at issue in this case, in an effort to provide this Court with potential differing arguments from those to be presented by the parties.

3. Pursuant to Rule 36.3, of the Rules of this Court, the proposed Amicus Brief is filed herewith.

WHEREFORE, the OCAW respectfully requests that this Honorable Court grant it leave to file the accompanying Brief as Amicus Curiae.

Respectfully submitted,

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OCTOBER TERM, 1987

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Appellant,
v.
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Appellee,

BRIEF FOR THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION AS AMICUS CURIAE SUPPORTING THE APPELLEE

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INTEREST OF THE OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION

The Oil, Chemical and Atomic Workers International Union (hereinafter "OCAW") is the exclusive bargaining agent of employees working throughout the petroleum, nuclear production, and energy industries, in general. The OCAW represented employees at the Portsmouth Gaseous Diffusion Plant located near Piketon, Ohio, a nuclear production facility owned by the United States and managed by Appellant Goodyear Atomic Corporation (hereinafter "Goodyear Atomic"). Appellee Esto Miller (hereinafter "Miller") was a member of the OCAW at the time of his employ with Goodyear Atomic.

The OCAW's interest in this case is in seeing that workers' compensation laws enacted to provide employees their sole and exclusive remedy against employers for on-the-job injuries, often caused by the employer's gross negligence and failure to provide a safe work place, are enforced and applied to adequately compensate those employees. In the within case the Supreme Court of the State of Ohio recognized the right of Miller to an increased award for his on-the-job injury. The OCAW's interest is in seeing that Goodyear Atomic is unsuccessful in attempting to divest Miller of his workers' compensation benefits. Preserving these benefits is critical, particularly for employees working in and around highly dangerous and volatile areas.

STATEMENT OF FACTS

The OCAW, as an amicus curiae, will present only a very brief statement of facts necessary for its argument. This Court has been and will be provided with more detailed facts from the parties to this appeal. In June of 1980, one of Miller's work gloves caught on a bolt protruding from a guard rail of a scaffolding upon which he was standing. As a result Miller was hurled off of the scaffolding and fell to a concrete

floor causing serious damage to his left foot and ankle. Miller received initial benefits under the Ohio workers' compensation law in the amount of approximately $9,000.00, apparently without opposition from Goodyear Atomic. Thereafter, Miller applied for an additional award provided in the Ohio workers' compensation statues claiming that the injury resulted from the failure of Goodyear Atomic to comply with specific requirements for protection of the health, lives or safety of employees. Ohio Constitution, Article II. §35.

Although the Industrial Commission of Ohio initially rejected Miller's application for supplemental benefits on the grounds of federal preemption, the Ohio Supreme Court, in response to Miller's mandamus action, eventually held that Miller was entitled to the supplemental benefits notwithstanding any alleged federal preemption. It is from the decision of the Ohio Supreme Court that Appellant Goodyear Atomic appeals.

SUMMARY OF ARGUMENT

A careful analysis of the Ohio Supreme Court cases supports the conclusion that, although Ohio's supplemental workers' compensation award for non-compliance with the specific safety requirements may have the effect of employers complying with those safety requirements, the true intention of the supplemental award provision is to provide additional workers' compensation to the injured employee. Indeed, in State Ex. Rel. Bailey v. Krise, 18 Ohio St.2d 191, 249 N.E.2d 55 (1969), the Ohio Supreme Court reviewed the apparently only available legislative history concerning Section 35 of Article II of the Ohio Constitution. This discussion supports the view that the supplemental workers' compensation award provision was added to substitute the rights of employees to sue employers for specific safety violations in return for the supplemental award. This quid pro quo further supports the view that the supplemental award is compensatory in nature and not an attempted or actual

regulation of a field allegedly within the exclusive provision of the Federal government.

The conclusion that the Ohio supplementary award is not preempted is further supported by the fact that, pursuant to 40 U.S.C. §290, state workers' compensation statutes are specifically allowed to apply with full force and effect to the type of installation run by Goodyear Atomic. Section 290 does not define workers' compensation laws. Therefore, since nearly 15% of the states contained provisions similar to Ohio's supplemental award provision at the time §290 was enacted, the supplemental award has been specifically provided for by Congress and, thus, the award is not preempted.

Should this Court determine that Congress has not displaced Ohio's ability to provide for the supplemental award, there remains no preemption since it is possible to comply with both the state and federal law, and, further, the state supplemental award does not stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. Without a showing that the Ohio workers' compensation law makes it impossible to comply with both state and federal laws, and, further, unless the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, this Court has held that preemption is not mandated Silkwood v. Kerr-McGee Corp., 464 U.S. 238, rehearing denied, 465 U.S. 1074 (1984).

ARGUMENT

I. THOSE SECTIONS OF THE OHIO WORKERS' COMPENSATION STATUTES WHICH PROVIDE FOR ADDITIONAL AWARDS DUE TO VIOLATIONS OF SPECIFIC SAFETY REQUIREMENTS ARE NOT, AND SHOULD NOT BE READ AS, REGULATIONS OF FEDERAL FACILITIES AND AS SUCH ARE A PROPER EXERCISE OF STATE AUTHORITY.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

A. The fact that the supplemental workers' compensation award may have the effect of deterring employers from non-compliance with specific safety requirements, does not alter the fact that the compensation award continues to compensate for a work related injury.

One of Goodyear Atomic's primary arguments, relied upon in urging that this Court find that the supplemental workers' compensation award for violation of safety requirements constitutes a regulation, is that the provision allegedly penalized employers who fail to comply with the safety requirements. Several Ohio Supreme Court decisions are cited discussing the deterrent effect of non-compliance with the safety requirements as far as additional compensation is concerned. See, e.g. State Ex. Rel. Emmich v. Industrial Commission, 148 Ohio St. 659, 76 N.E.2d 710 (1947). Goodyear Atomic concludes that Ohio's system is "primarily intended to deter employer noncompliance with state-promulgated specific safety requirements, and to enforce compliance with those requirements, through the assessment of monetary penalties." Brief for Appellant at 12-14. Goodyear Atomic's reasoning--as well as language in certain Ohio Supreme court decisions--should not convince this Court that the workers' compensation provision constitutes a regulation.

Neither Goodyear Atomic nor any of the decisions of the Ohio Supreme Court relied upon by Goodyear Atomic has cited to any legislative history or declaration that the additional compensation award was intended to be a penal regulation. Rather, it is from the fact that the additional compensation award may have the effect of acting as a deterrent that the Ohio Supreme Court has mentioned that the additional award becomes in the nature of a penalty and that Goodyear Atomic argues that the award becomes an unlawful regulation. A closer analysis of the Ohio Supreme Court decisions,

however, indicates that Goodyear Atomic's position lacks persuasiveness.

In addition to the fact that, as will be discussed below, the workers' compensation supplemental award is not a penal law, the Ohio Supreme Court, itself, characterizes the additional award as compensation for injury, death and disease occurring on the job. Citing State Ex. Rel. Emmich v. Industrial Commission, supra, the Supreme Court of Ohio in State Ex. Rel. the Kroger Co. v. Industrial Commission, 62 Ohio St.2d 4, 402 N.E.2d 528, (1980) discusses the penal nature of the compensation only as it affects the employer. The Court continues that awards for violations of specific safety requirements are "compensatory as far as the employee is concerned." 402 N.E.2d at 530. The Court concludes as follows:

> The award goes directly to the injured employee, not to the state as a fine. Although compensation is calculated with reference to some standard of employer culpability, additional awards for violations of specific safety requirements are an integral part of Ohio's workers' compensation scheme.

Ibid.

The Ohio Court concluded that, since the additional award is compensatory and not regulatory, the award was not preempted by federal law (the Occupational Safety and Health Act of 1970). Id. Therefore, Goodyear Atomic mischaracterizes the decisions of the Ohio Supreme Court. Although the deterrent effect is often mentioned in opinions, the Ohio court decisions recognize and affirm the true purpose of the additional award - compensation for a work related injury.

The record, however, is not void of discussion by the Ohio Supreme Court concerning the legislative intent and purpose of the supplemented workers' compensation award provided in the Ohio Constitution, Article II, §35. In State Ex.

Rel. Bailey V. Krise, supra, 18 Ohio St.2d 191, 249 N.E.2d 55 (1969), the Ohio Court specifically reviewed the history of Section 35 of Article II of the Ohio Constitution. In Krise, the Ohio Supreme Court begins by noting that, under the original form of Section 35, as adopted in 1912, an employee receiving an award for compensable injury was specifically not precluded form suing his employer for the employer's failure to comply with lawful requirements for the protection of the lives, health and safety of employees. Ibid., 249 N.E.2d at 58-59. The Court continues:

> The amendment of 1923 abolished this right and substituted the additional award from the state insurance fund. Since that time, Section 35 of Article II has relieved employers from having to respond in damages for violations of specific safety requirements. In return employees have relinquished their right to seek damages for those violations.

249 N.E.2d at 58-59. This discussion specifically recognizes that, as with any workers' compensation law, compensating the injured employee is the goal and intent, evidenced by the usual quid pro quo: the employee exchanging a right to a cause of action against his employer for compensation via the workers' compensation statutory scheme.

The exclusive remedy characteristic is the distinguishing feature of workers' compensation provisions, in general. This principle is recognized by Professor Larson:

> Once a workmen's compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or his dependents against the employer and insurance carrier. This is a a part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes new liability without fault, he is relieved of the prospect of large damage verdicts.

2A A. Larson, The Law of Workmen's Compensation, §65.11 at 12-1-12-12. (1987) (footnotes omitted).

Since the usual quid pro quo was Ohio's express goal in establishing the supplemental award provisions of the Ohio Constitution, reflected by the legislative history available as expressed in Krise, the award is compensatory, and neither an attempt to regulate nor unlawfully regulatory in effect. That the supplemental award may result in some deterrent effect should not lead to the conclusion that the State is regulating in an area exclusively within the province of the federal government. Rather, Ohio compensates employees for on-the-job injuries.

Goodyear Atomic lays particular emphasis on language in certain Ohio Supreme Court opinions that the supplemental award may become, due to the deterrent effect, a penalty. Goodyear Atomic would have this Court conclude that the supplemental award provision, therefore, is a penal law preempted by federal law for that reason, among others. However, the Ohio Supreme Court specifically rejected Goodyear Atomic's position in State Ex. Rel. Bailey v. Krise, supra, 18 Ohio St.2d 191, 249 N.E.2d 55, (1969) holding that the primary characteristic of the additional award provision of Article II, §35 of the Ohio Constitution "is compensatory, not penal."

It has been held that "penal laws . . . are those imposing punishment for an offense against the state . . . ." Huntington v. Attrill. 146 U.S. 657, 668 (1892). Judge Cardozo, writing for the New York Court of Appeals, elaborated on this concept by noting that a penal statute "is one that awards a penalty to the state, or to a public officer in its behalf, or to a member of a public suing in the interest of the whole community to redress a public wrong." Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198, 198 (1918). In light of these judicial pronouncements concerning a "penal law" one can readily see that, although the supplemental

workers' compensation award may have the effect of deterring noncompliance with the safety requirements, the statute's true goal is providing additional compensation to employees injured on the job.

Goodyear Atomic's conclusion, therefore, that that Ohio workers' compensation supplemental award is "primarily intended to deter employer noncompliance with the state-promulgated specific safety requirements . . . through the assessment of monetary penalties," Brief of Appellant at 13-14, is contrary to a reading of the Ohio Supreme Court cases, Ohio statutes and the Ohio Constitution.

Goodyear Atomic attempts to focus this Court's attention fully to the deterrent effect of the workers' compensation supplemental award provision. The fallacy of relying upon the effect of the statutory provision is brought out when one examines the theory of workers' compensation laws, in general. Workers' compensation laws are in place in order to compensate injured employees as an exchange for any common law remedies they may have against their employers. See, e.g., State Ex. Rel. Bailey v. Krise, supra, 18 Ohio St. 2d 191, 249 N.E. 2d 55; 2A A. Larson, The Law of Workmen's Compensation, §65.10, et. seq. (1987). The employee's right to bring a lawsuit against his employer for the on-the-job injury is stripped from him in exchange for compensation pursuant to state workers' compensation laws. Since workers' compensation insurance is a substantial expense of business and, further, since numerous hefty workers' compensation awards entered against an employer would have the direct effect of increasing insurance premiums, a major effect of workers' compensation statutes of the generic type, without the supplemental provision for awards appearing in the Ohio statutes, is the employer ensuring that his work place is safe. In this way, compensation claims will be minimized.

The effect, therefore, of a generic workers' compensation law is an employer providing a safe work place. Carrying the theory of Goodyear Atomic to its conclusion, since workers' compensation statutes also may have the effect of providing a safe work place, workers' compensation laws would constitute a regulation, utilizing the broad definition of regulation which Goodyear Atomic urges upon this Court. A decision should not stand or fall merely because certain safety requirements are enumerated. As with all workers' compensation statutes, the deterrent effect may be present and the employer will take steps to provide a safe work place. Nonetheless, such a minimal effect should not dictate the preemption issue.

Since the award to Miller for Goodyear Atomic's failure to comply with regulations concerning the safety and health of the employees, was paid directly to him and not the State of Ohio, was based upon the employee's weekly wage rate, and was awarded pursuant to a true workers' compensation statute, the provision is not a regulation and the award must be allowed.

B. Recent amendments to Ohio Administrative Code §4121-3-20 emphasize that the statute and regulations in effect at the time the within case arose do not constitute an impermissible regulation preempted by federal law.

On August 22, 1986, extensive amendments were made to the Ohio workers' compensation laws. Specifically, for purposes of the within appeal, the Ohio Revised Code was amended to allow the Industrial Commission to find an employer guilty of violating specific safety requirements. Ohio, Rev. Code §4121.47(D). When an employer is found guilty of violating a specific safety requirement, the Industrial Commission "shall, in addition to any award paid to the claimant, issue an order to correct the violation within such

period of time as the Commission fixes." Ibid. Further, if two violations for specific safety requirements occur in a twenty-four month period, the Commission is to assess a civil penalty against the employer in an amount the Commission determines up to a maximum of $50,000.00 for each violation. Id.

The Ohio Administrative Code § 4121-3-20, reprinted completely in the Joint Appendix beginning at page 64, demonstrated further extensive amendments to the Ohio workers' compensation laws. The capitalized paragraphs and portions of that section represent those portions added in 1986. In new subsection (I) of §4121-3-20, if the Commission determines that the safety violation is committed by an employer continuing in business in Ohio, even when the request for an award by the injured employee is denied by lack of proof of proximate cause of the relationship between the violation and the injury, the order adjudicating the application for additional award shall direct that the violation be corrected within a specified time period. The new provision also provides for an additional penalty to be paid to the State by the employer and provides for an additional penalty given two violations of a specific safety requirement in a twenty-four month period under certain circumstances.

The amendments described above, which amendments are not controlling in this case since they were made effective August 22, 1986, and the injury occurred in this case in July of 1980, expand the powers of the Industrial Commission well beyond providing an additional award to an injured employee. Although not controlling in this case, these recent amendments lend insight into the intent, scope and meaning of the Ohio workers' compensation laws prior to the amendments.

The amendments to the Ohio workers' compensation laws expressly grant the Industrial Commission power to enforce the safety requirements and assess penalties payable to the State for failure to comply with those safety requirements. The amendments demonstrate that, prior to their enactment in 1986, the workers' compensation supplemental award for

injuries caused when safety requirements were not followed could only be characterized as compensation to an employee for an on-the-job injury. The most that could be said concerning the provisions prior to the 1986 amendments is that their effect could have been, with some employers, the compliance with safety requirements to avoid the additional compensation to the employees. The Ohio General Assembly's grant of additional powers to the Industrial Commission by way of its 1986 amendments highlights the fact that the provisions concerning compensation payable to employees is truly compensation to employees and was not intended by the legislators to be a penalty.

Certain specific language of the recent amendments lends support to the theory that the award to the employee for injury caused by non-compliance with certain safety requirements is one for compensation and not a penalty or corrective measure. Section 4121.47(B), Ohio Revised Code, states that the Industrial Commission "shall, in addition to any award made to the claimant, issue an order to correct the violation . . . ."(Emphasis added.) The highlighted portion of this section delineates the line between a compensation award and a penalty. Further, the new subsection of the Ohio Administrative Code §4121-3-20(I) directs the Industrial Commission to see that the employer correct a violation whether or not the order adjudicating application for an additional compensation award results in an award to the employee. Again, subsection (I) emphasizes the penal nature of the statute as amended and further emphasizes that an award for compensation is separate and apart from any penal or corrective intent in the statute.

The amendments in effect in August of 1986, which amendments are not applicable to this appeal, lend insight into the issue of whether the additional compensation award to an employee surrounding safety violations can fairly be read as a regulation. The amendments emphasize that the award to an employee is for workers' compensation and, although

possibly having certain effects, is not penal or corrective in its purpose.

The amendments enacted in 1986 could very well have been enacted at any time in the history of the Ohio workers' compensation laws. The penalty provisions for violating safety requirements could have been enacted along with the provision giving an employee an additional award, or any time thereafter, but they were not. Thus, the statute read without the amendments assists in determining that the compensation awarded to Miller in this case was merely a compensation award and not a regulation.

II. THE STATE OF OHIO MAY PROPERLY ASSESS AN ADDITIONAL WORKERS' COMPENSATION AWARD FOR AN INJURY CAUSES BY AN EMPLOYER'S SAFETY VIOLATION SINCE CONGRESS HAS EXPRESSLY ALLOWED FOR WORKERS' COMPENSATION AWARDS.

States may regulate in areas exclusively within their policy power and may regulate the activities of the United States pursuant to the Supremacy Clause when such regulation has been clearly and unambiguously authorized by Congress. Hancock v. Train, 426 U.S. 167 (1976); Mayo v. United States, 319 U.S. 441 (1943). Thus, if Congress has specifically authorized the application of Ohio's workers' compensation laws to the Appellant, the provisions would not be subject to challenge on preemption and/or Supremacy Clause grounds.

In the within case, Congress has, in fact, given the State of Ohio the right to enforce its workers' compensation laws pursuant to 40 U.S.C. §290. This Section states in pertinent part as follows:

> Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State Workmen's Compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cessation, by purchase or otherwise, which is within the exterior boundaries of any State, and to all projects, buildings, constructions, improvements and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

As the Appellant readily admits, Section 290 does not define "workmen's compensation laws." Indeed, the Appellant admits that, at the time Section 290 was enacted, Ohio was one of seven states with a provision such as the provision at issue in this case requiring an additional award for non-compliance with a safety requirement. See 2A A. Larson, The Law of Workmen's Compensation, §69.10 at 13-107 to 13-111 (1982).

Thus, Congress has, in fact, provided that the workers' compensation laws of the State of Ohio would be controlling concerning the Federal government installation. Since, at the time §290 was enacted nearly fifteen percent of the states contained a provision allowing for additional compensation to the employee in the event of a violation of a safety requirement (7 States out of 48), Congress could have excluded awards for such violations, but did not. Perhaps Congress did not preclude an additional workers' compensation award for such a violation since the members of

Congress believed such an award was not the type of prohibited regulation which Appellant desires this Court to believe. In any event, since Congress has allowed for the State of Ohio to apply its workers' compensation laws in the circumstances presented in the within case, Appellant's extensive arguments concerning preemption and the Supremacy Clause should fail. As this Court held in New York Telephone Company v. New York State Department of Labor, 440 U.S. 519, 539 - 40 (1979), state laws such as workers' compensation statutes or unemployment compensation statutes should be given great deference since these statutes protect interests deeply rooted in local feeling and responsibility.

III. SHOULD THIS COURT DETERMINE THAT CONGRESS HAS NOT DISPLACED OHIO'S ABILITY TO REGULATE IN THE AREA OF WORKERS' COMPENSATION, NO PREEMPTION EXISTS SINCE IT IS POSSIBLE TO COMPLY WITH BOTH STATE AND FEDERAL LAW AND THE STATE LAW DOES NOT STAND AS AN OBSTACLE TO THE ACCOMPLISHMENT OF THE FULL PURPOSES AND OBJECTIVES OF CONGRESS.

As stated above, in the within case, Congress has, in fact, specifically provided that Ohio's workers' compensation laws are not preempted and apply with full force and effect in the within instance. However, to the extent that this Court determines that 40 U.S.C. §290 does not specifically allow for the supplemental award given to Mr. Miller, applying further preemption tests established by the Court requires a finding that the matter is not preempted.

In Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, rehearing denied 465 U. S. 1074 (1984) this Court stated the general test as follows:

> If Congress has not entirely displaced State regulation over the matter in question, State law is still preempted to the extent is actually conflicts with Federal law, that is, when it is impossible to comply with both State and Federal law, Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where the State law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Ohio's supplemental workers' compensation award neither makes it impossible to comply with both State and Federal law nor stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. In analyzing this case for preemption purposes, this Court should "examine closely the facts of each case to determine whether the dangers and hardships of diverse regulations justify foreclosing a State from the exercise of its traditional powers." Colorado Anti-Discrimination Commission v. Continental Airlines, 372 U.S. 719 (1963).

The workers' compensation supplemental award of the State of Ohio does not create a circumstance where it is impossible to comply with both the State law and the Federal law. Indeed, it must be recalled that, although the Ohio workers' compensation supplemental award may have the effect of employers complying with those provisions, such effect is not the purpose of the workers' compensation statute. The compensation statue is intended to compensate injured individuals for on-the-job injuries in exchange for any common law rights they may have had against an employer.

Nonetheless, although the appellant would urge this Court to find that there is a conflict between the State and Federal law in this instance, such is not the case. If an

employer felt pressure to comply with the Ohio safety regulations concerning scaffolding at issue in the within case, he would be complying as well with the Federal regulations since both are virtually identical. The Ohio statute as issue provides, among other things, that "[e]xposed surfaces [on scaffolds] shall be free from sharp edges, burrs or other projecting parts." Ohio Admin. Code, §4121: 1-5-03 (D)(2)(1986). The Federal regulation provides concerning scaffolding that "[a]ll exposed surfaces shall be free from sharp edges, burrs or other safety hazards." 29 C.F.R. §1910.29 (a)(2)(v). The standards set forth in Title 29, Code of Federal Regulations, Part 1910, are made applicable to Department of Energy facilities pursuant to Department of Energy Order No. 5483.1A, Chapter 1, 1.(a). Therefore, it is difficult to see how it is impossible to comply with both the State and Federal safety requirements when both are identical.

It must not be overlooked that, concerning the Ohio workers' compensation statute at issue in the within case, the sole result of non-compliance by an employer is an additional award to the injured employee. No regulatory scheme was in force which was utilized by the State of Ohio to ensure compliance with the safety regulations. Nonetheless, to comply with both the State and Federal safety regulations at issue in this case is not impossible since complying with one would be compliance with the other. The State of Ohio has not imposed additional burdens or different burdens upon the employer in the circumstances presented in this case. Such being the case, in light of the circumstances presented, pre-emption is not warranted. Even if the State has imposed somewhat different safety standards in allowing for additional workers' compensation award, the allowance for such an award would not be preempted since it is not a regulation by the State.

In Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, (1963) this Court stated that "[t]he test of whether both federal and state regulations may operate, or the

state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." In the case before this Curt, the additional award to employees in no way interferes with the Federal government's enforcement of its safety provisions as provided in the above Department of Energy Order. This Court must be able to conclude that "the purpose of the federal statute would to some extent be frustrated by the state statute." Colorado Anti-Discrimination Commission V. Continental Airlines, Inc., supra, 372 U.S. at 722. In the within case, paying Mr. Miller an additional compensation award in no way frustrates the purpose of any Federal statute or regulation. To say that an employer is pressured into complying with the State safety regulations is identical to arguing that the State workers' compensation laws, themselves, require that an employer maintain a safe work place.

This Court has, as mentioned above, recognized the broad authority of States pursuant to their police powers to regulate such matters as workers' compensation. See De Canas v. Bica, 424 U.S. 358 (1976). In De Canas the Court stated in language particularly pertinent to the within issue, with respect to California's regulations concerning immigration, that "even if such local regulation has some purely . . . indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve." De Canas, 424 U.S. at 355-356.

In the within case, the appellant is attempting to stretch broad regulatory powers of the Federal government to preclude individuals injured on the job from receiving workers' compensation benefits when such injury is occasioned by a potential safety violation. Since the Ohio workers' compensation scheme can be enforced without intruding into the Federal government's regulation, for safety purposes, of the Federal plant, the workers' compensation

award should stand and the statute with respect to its applicability in the within case should not be held to be preempted.

CONCLUSION

Amicus curiae, Oil, Chemical and Atomic Workers International Union respectfully urges this Court to affirm the decision of the Supreme Court of the State of Ohio, allowing Appellee Miller to receive the compensation for the work-related injury which the State has substituted for his common law rights against his employer.

Respectfully submitted,

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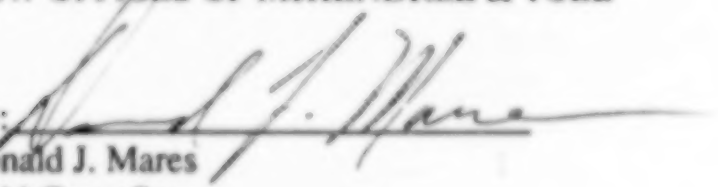
By: 

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BRIEF

No. 86-1172

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GOODYEAR ATOMIC CORPORATION,
Appellant,

v.

STATE EX REL. ESTO MILLER,
Appellee.

On Appeal from the Supreme Court of Ohio

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QUESTIONS PRESENTED

I. Whether Congress's express authorization of state worker's compensation laws at federally owned facilities excludes a provision for enhanced compensation for injury caused by the employer's violation of a specific state safety standard.

II. Whether the sovereign immunity of the United States insulates a private contractor operating a nuclear production facility from liability for an enhanced worker's compensation award when injury results from the contractor's violation of a state safety regulation.

III. Whether the Atomic Energy Act of 1954 and DOE regulations preempt an enhanced worker's compensation award for injury to an employee caused by violation of a state safety standard that is unrelated to nonradiological hazards and entirely consistent with federal law.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT OF THE CASE	3
INTRODUCTION AND SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. Congress's Unqualified Authorization To Apply State Worker's Compensation Laws At Federally Owned Facilities Includes Enhanced Awards For Violation Of State Safety Requirements	9
II. The Immunity Of The United States From Direct State Regulation Is Not Available To A Private Contractor To Resist Payment Of An Enhanced Worker's Compensation Claim Arising From The Contractor's Violation Of A State Safety Standard	14
III. The Atomic Energy Act Of 1954 Did Not Preempt Application Of A State Provision For Enhancement Of A Worker's Compensation Award When Injury Results From Violation Of A State Safety Standard By An Employer Operating A Nuclear Production Facility	22
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Alabama v. King & Boozer, 314 U.S. 1 (1941) ... 19
Brotherhood of Locomotive Engineers v. Chicago, R.I. & P. R.R., 382 U.S. 423 (1966) ... 25
Brown v. Ohio, 432 U.S. 161 (1977) ... 12
California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419 (1987) ... 24
California Federal Savings & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987) ... 24
California Public Utilities Comm'n v. United States, 355 U.S. 534 (1958) ... 21
Citizens for a Better Henderson v. Hodel, 768 F.2d 1051 (9th Cir. 1985) ... 16
Citizens & Landowners Against the Miles City/New Underwood Powerline v. Secretary, 683 F.2d 1171 (8th Cir. 1982) ... 16
Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981) ... 16
Don't Tear It Down, Inc. v. Pennsylvania Avenue Development Corp., 642 F.2d 527 (D.C. Cir. 1980) ... 16
Electrical Workers v. Foust, 442 U.S. 42 (1979) ... 25
EPA v. State Water Resources Control Board, 426 U.S. 200 (1976) ... 15
Fidelity Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982) ... 24, 25
Hancock v. Train, 426 U.S. 167 (1976) ... 8, 15, 16, 20
Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) ... 25, 29
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) ... 25
Industrial Fabricators, Inc. v. Ohio Industrial Comm'n, No. C-2-77-119 (S.D. Ohio) (Oct. 3, 1979) ... 12, 17
International Paper Co. v. Ouellette, 107 S. Ct. 805 (1987) ... 24, 25
Jones v. Rath Packing Co., 430 U.S. 519 (1977) ... 24
Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956) ... 21

TABLE OF AUTHORITIES—Continued

Page

Mayo v. United States, 319 U.S. 441 (1943) ... 15
M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) ... 15
McMunn v. Hertz Equipment Rental Corp., 791 F.2d 88 (7th Cir. 1986) ... 18
Minnesota v. Hoffman, 543 F.2d 1198 (8th Cir. 1976), *cert. denied*, 430 U.S. 977 (1977) ... 16
Murray v. Gerrick & Co., 291 U.S. 315 (1934) ... 10-11, 11, 14
Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972) ... 27
North Haven Board of Education v. Bell, 456 U.S. 512 (1982) ... 11
Ohio v. Thomas, 173 U.S. 276 (1899) ... 15
Owen v. City of Independence, 445 U.S. 622 (1980) ... 11, 12
Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190 (1983) ... 8, 22, 23, 25, 28
Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987) ... 25
Paul v. United States, 371 U.S. 245 (1963) ... 21
Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261 (1943) ... 18
Piedmont Northern Ry. v. ICC, 286 U.S. 299 (1932) ... 11
Powell v. United States Cartridge Co., 339 U.S. 497 (1950) ... 15
Rudock v. Snell, 97 A.D. 2d 569, 467 N.Y.S. 2d 933 (1983) ... 7
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) ... *passim*
State ex rel. Bailey v. Krise, 18 Ohio St. 2d 191, 249 N.E.2d 55 (1969) ... 12, 17, 18
State ex rel. Emmich v. Industrial Comm'n, 148 Ohio 658, 76 N.E.2d 710 (1947) ... 12
State ex rel. Kroger Co. v. Industrial Comm'n, 62 Ohio St. 2d 4, 402 N.E.2d 528 (1980) ... 12

TABLE OF AUTHORITIES—Continued

	Page
Terminal Railroad Ass'n v. Brotherhood of Railroad Trainmen, 318 U.S. 1 (1943)	25
United States v. City of Detroit, 355 U.S. 466 (1958)	19
United States v. Georgia Public Service Comm'n, 371 U.S. 285 (1963)	21
United States v. New Mexico, 455 U.S. 720 (1982)	8, 19, 20, 21
United States v. Pennsylvania Environmental Hearing Board, 584 F.2d 1273 (3d Cir. 1978)	19, 20
CONSTITUTIONAL PROVISIONS:	
U.S. Const., Art. I, § 8, cl. 17	10
U.S. Const., Art. VI, cl. 2 (Supremacy Clause)	5, 7, 14, 15, 16
Ohio Const. Art. II, § 35	5
STATUTES, RULES, AND REGULATIONS:	
Federal:	
Atomic Energy Act of 1954, 42 U.S.C. (& Supp. III) § 2011 *et seq.*	*passim*
42 U.S.C. § 2021	26
42 U.S.C. § 2021(b)	27, 28
42 U.S.C. § 2021(c)	27
42 U.S.C. § 2021(k)	9, 26, 27, 28
42 U.S.C. § 2061	26
42 U.S.C. § 2061(a)	26
42 U.S.C. § 2061(b)	26
42 U.S.C. § 2061(b)(2)(C)	26
Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. III) § 651 *et seq.*	4
29 U.S.C. § 653(b)	12
29 U.S.C. § 653(b)(1)	5
29 U.S.C. § 653(b)(4)	13, 29
16 U.S.C. § 457	10, 11, 14
28 U.S.C. § 1445(c)	13
40 U.S.C. § 290	*passim*

TABLE OF AUTHORITIES—Continued

	Page
29 C.F.R. § 1910.28 (1986)	4
29 C.F.R. § 1910.29 (1986)	4
29 C.F.R. § 1910.29(a)(2)(v) (1986)	4
Ohio:	
Ohio Admin. Code (1986):	
§ 4121:1-5-03(D)(1)	4
§ 4121:1-5-03(D)(2)	4
BOOKS AND TREATISES:	
81 Am. Jur. 2d *Workmen's Compensation* (1976)	7
A. Larson, *The Law of Workmen's Compensation* (1987)	6, 7
W. Prosser & W. Keeton, *The Law of Torts* (1984)	17, 18
MISCELLANEOUS:	
DOE Order No. 5483.1 (April 13, 1979)	5, 29
DOE Order No. 5481.1B (Sept. 23, 1986)	4, 5, 29
H.R. Rep. No. 2656, 74th Cong., 2d Sess. (1936)	11
S. Rep. No. 2294, 74th Cong., 2d Sess. (1936)	10, 11, 13

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* and their members have a compelling interest in legal issues that affect state and local governments.

The State of Ohio provides a modest additional worker's compensation award when injury results from an employer's violation of a specific state safety standard. Appellee Miller was injured because a bolt was left protruding on a scaffold, in violation of an Ohio stand-

ard, which, as it happens, is virtually identical to federal standards promulgated by the federal Occupational Safety and Health Administration and adopted by the United States Department of Energy. Appellant Goodyear, a private contractor, claims that it cannot be required to pay an enhanced award because the accident occurred on the premises of a federally owned nuclear production facility. Characterizing Ohio's enhanced award provision as regulation, Goodyear contends, first, that it is covered by the cloak of sovereign immunity that protects the government itself from state regulation; and, second, that the Atomic Energy Act of 1954 preempts all state regulation of occupational safety at federally owned nuclear production facilities, even when, as in this case, the regulation addresses non-radiological hazards.

Amici are concerned that acceptance of these contentions would undercut the administration of worker's compensation programs that Congress long ago expressly made applicable to non-federal employees working at federally owned facilities. Many state compensation programs provide additional remedies for injuries caused by employer misconduct, some, like Ohio, in the form of an enhanced award, others through the preservation of remedies at law. *Amici* are also concerned about the suggestion that private contractors managing federal facilities share the federal government's own immunity from otherwise applicable state law, and about the proposed expansion by implication of federal preemption in the area of employee health and safety, which traditionally has been subject to state as well as federal regulation.

Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

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[1] Under Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Amici agree with the statements presented to the Court by Esto R. Miller and the State of Ohio, but wish to emphasize the following facts to demonstrate the complete compatibility of the state and federal laws applicable to Goodyear in this case.

This case arose when a maintenance mechanic fractured his left ankle in a fall because his clothing caught on a bolt used as a makeshift replacement for a hinge on a scaffold. The accident occurred at a nuclear production plant in Portsmouth, Ohio, owned by the United States and operated by a private company, Goodyear Atomic Corp., under contract with the Department of Energy ("DOE").

The contract under which Goodyear operates the Portsmouth plant recognizes throughout that Goodyear is a private employer subject to state law. Goodyear is "a corporation organized and existing under the laws of the State of Ohio, with its principal place of business at Akron, Ohio." Supplemental Agreement, DOE Contract No. DE-AC05-760R00001, Modification No. MO42, at p. 1 (March 17, 1982) ("DOE Contract"). Although DOE owns the facility, Goodyear is charged "to manage, operate, and maintain" it, and to "use its best judgment, skill, and care" in the performance of the contract (*id.*, Art. III, at p. 3). Goodyear is responsible for employment of all personnel who, "for the purposes of this contract shall constitute employees of [Goodyear]" (*id.*, Art. III, § 5a, at pp. 5-6). Goodyear is also required to "take all reasonable precautions . . . to protect the safety and health of employees" (*id.*, Art. XX, at p. 29). The contract specifically provides that Goodyear "will not be required to operate the Facility in any manner which it deems unsafe to the Facility or personnel" (*id.*, Art. III, § 1.a, at p. 4).

Several provisions of the contract require or envision Goodyear's compliance with state law. For example, Goodyear must "procure all necessary permits or licenses

and *abide by all applicable laws*, regulations, and ordinances of the United States and *of the State* . . . in which the work under this contract is performed" (*id.*, Art. XXI, at p. 30) (emphasis added). Goodyear must notify DOE whenever it "anticipates that any labor practice or procedure or proposed labor practice or procedure may violate any applicable Federal, state or local law, order or regulation" (*id.*, Art. XXVII, § 3, at p. 33). Goodyear must also notify DOE of "any State or local tax, fee or charge" which may be an allowable cost under the contract (*id.*, Art. XIV, § 1, at p. 25). Goodyear must require subcontractors to agree to comply with standards imposed under the federal Clean Air Act and the Federal Water Pollution Control Act, including state and local implementation plans (*id.*, Art. LII, §§ 1.c, 2.c, at pp. 61-62).

This case involves an Ohio safety standard for scaffolds that provides: "Exposed surfaces shall be free from sharp edges, burrs, or other projecting parts" (Ohio Admin. Code § 4121:1-5-03(D)(2) (1986)). The standard is virtually indistinguishable from the standard promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. III) § 651 *et seq.* ("OSHA"), and adopted by DOE: "All exposed surfaces shall be free from sharp edges, burrs or other safety hazards" (29 C.F.R. § 1910.29(a)(2)(v) (1986)).[2] DOE's safety and health program for the employees of its contractors focuses on protection from radiological hazards, rather than the ordinary vicissitudes of the workplace.[3]

[2] The various federal and Ohio safety requirements for scaffolds are entirely consistent, and many of the specific standards are equivalent or identical, as in this case. Compare, *e.g.*, 29 C.F.R. § 1910.28 and 1910.29 (1986) with Ohio Admin. Code § 4121:1-5-03(D)(1) and (D)(2) (1986).

[3] DOE's current Safety Analysis and Review System specifically excludes "[c]onstruction-related work activities" (DOE Order No. 5481.1B, § 4(c) (Sept. 23, 1986)), and is limited to "those DOE operations that involve hazards that are not routinely encountered and accepted in the course of everyday living by the vast majority of the general public" (*id.*, Ch. II, § 2(b)).

DOE has, with respect to non-radiological hazards, adopted by reference Occupational Safety and Health Administration standards,[4] which are described as "[m]inimum safety and health standards."[5]

Miller's injury did not give rise to any claim against DOE or any other agency or employee of the federal government. The accident occurred during routine maintenance work and did not involve any radiological hazard. Goodyear, which was registered with the Ohio worker's compensation program as a "State Fund employer (Risk No. 258953)," certified Miller's initial worker's compensation claim for payment by the Ohio State Fund (J.A. 37-39). Miller received about $9,000 (J.S. 9); he then sought an enhanced award of 15 to 50% (for a maximum of about $4,500), pursuant to Article II, § 35, of the Ohio Constitution, on the ground that his injury had resulted from Goodyear's violation of a specific state safety requirement (J.A. 40). Goodyear appears initially to have accepted that the state safety standard was applicable, contending that the scaffold involved in the accident complied with that standard, and with federal and industry standards as well, and that the injury arose from Miller's negligence.[6] Goodyear now contends that the enhanced award is barred by the Supremacy Clause of the Constitution under principles of sovereign immunity and preemption.

[4] OSHA, which is the general federal law regulating workplace safety, does not apply directly to the Portsmouth plant because of the exclusion in that Act for "employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1); see J.A. 85-105.

[5] DOE Order No. 5481.1B, Ch. I, § 1(a) (Sept. 23, 1986)). The order in effect at the time of Miller's injury similarly adopted OSHA standards. See Occupational Safety and Health Program for Government-Owned Contractor-Operated Facilities, DOE Order No. 5483.1, § 1(a) (April 13, 1979).

[6] See Letter from C.M. Hutchings, Goodyear Atomic Corp., to Industrial Comm'n of Ohio (January 28, 1981) (J.A. 43-44). This

INTRODUCTION AND SUMMARY OF ARGUMENT

A federal statute, 40 U.S.C. § 290, expressly authorizes the application of state worker's compensation laws to federal facilities like the Portsmouth plant. The issue in this case is whether that authorization includes an enhanced worker's compensation award provided by the State of Ohio for injuries resulting from an employer's violation of a specific state safety standard. Awards of this character are integral to the implementation of worker's compensation programs in many States.[7]

At least eighteen States provide remedies in addition to basic compensation awards for workers injured through an employer's misconduct or negligence. At least six state compensation programs preserve workers' remedies at law for injuries caused by violations of state law.[8] At least twelve States, including Ohio, provide an enhanced compensation award to an employee whose injury results from the employer's misconduct, including violation of safety regulations.[9] This model has gained in

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case is before the Court without a determination by the Ohio Industrial Commission whether Goodyear has in fact violated the Ohio scaffold safety standard (J.S. App. 15a).

[7] In 1936, when Section 290 was enacted, at least seven States had provisions similar to the Ohio law at issue here, providing for enhancement of worker's compensation awards for violation of safety regulations or failure to provide required safety devices. See 2A A. Larson, *The Law of Workmen's Compensation* § 69.10, at 13-199 to 13-203 (1987).

[8] The option to sue at common law is given by statute in Arizona for an employer's willful misconduct; in Kentucky, Oregon, Washington, and West Virginia for intentional injury caused by the employer; and in Texas for willful act or gross negligence causing death. See Larson, *supra* n.7, § 69.10, at 13-199.

[9] Percentage increases of compensation awards are provided in Arkansas, Kentucky, Missouri, New Mexico, North Carolina, Ohio, South Carolina, Utah, and Wisconsin for failure to provide safety devices or to obey safety regulations or to comply with duties imposed by statute or regulation. Larson, *supra* n.7, at 13-199 to

popularity and has been commended by the leading commentator in the field.[10]

Enhancement of worker's compensation awards when injury is attributable to the fault or neglect of the employer serves important state interests. *Amici* submit that permitting such awards for workers at federally owned facilities like the Portsmouth plant will not compromise in the least the federal government's paramount interests in control of nuclear material and protecting the national security.

I. Nothing in the language or the legislative history of 40 U.S.C. § 290 indicates that Congress intended to restrict the general authorization to apply state worker's compensation programs to employees at federal facilities. Provisions for enhanced compensation awards for violation of specific state safety requirements were common to several States when Congress enacted Section 290. Goodyear has not shown that Congress was unaware of such provisions, still less that it intended to exclude them from Section 290's unqualified grant of authority.

Nor is there anything in the Atomic Energy Act of 1954, or any other federal law, to suggest that Congress intended to withdraw or limit that broad authorization. Indeed, any such inference would be contrary to the consistent deference that Congress has given to the administration of state worker's compensation laws since 40 U.S.C. § 290 was enacted in 1936.

II. The Supremacy Clause bars state regulation of federal instrumentalities and property in the absence of

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13-201. New York has provided an award of double compensation for violation of a safety rule. See *id.* § 69.24(a), at 13-214 n.84.1, citing *Rudock v. Snell*, 97 A.D.2d 569, 467 N.Y.S.2d 933 (1983). California and Massachusetts provide increased awards of 50% and 100%, respectively, as penalties for serious and willful misconduct of the employer. See Larson, *supra* n.7, at 13-201 to 13-203.

[10] See Larson, *supra* n.7, § 70.00, at 13-230; see also 81 Am. Jur. 2d *Workmen's Compensation* §§ 55, 56 (1976).

congressional authorization, but it does not immunize private parties from generally applicable state laws simply because they happen to deal with the United States. Goodyear relies chiefly on *Hancock v. Train*, 426 U.S. 167 (1976), which held that a State could not enforce a permit requirement that would preclude the federal government from operating a facility if a permit were not obtained. *Hancock*, however, was not concerned with any burden that state regulation might place on private contractors. Ohio's enhanced compensation award provision in no way prohibits or restricts any federal government operation.

Nor is there any reason why the enhanced award provision should be "treated" as a regulation of federal government activity. The award is not a penalty; it provides additional compensation to employees who have been injured because of their employer's neglect or default. There is no showing that enforcement of the Ohio provision would interfere in any way with Goodyear's federal mission or with any policy of the United States. The award merely imposes a slight financial burden on Goodyear. This case is, therefore, indistinguishable in principle from *United States v. New Mexico*, 455 U.S. 720 (1982), in which this Court rejected a claim of sovereign immunity from state taxes asserted by private contractors engaged, like Goodyear, in managing federal property.

The enhanced compensation award, moreover, flows from Ohio's concern, which the federal government shares, for employee safety. Indeed, the state safety standard is virtually identical to a standard promulgated under OSHA and adopted by DOE.

III. Goodyear's preemption argument based on the Atomic Energy Act is decisively answered by this Court's decision in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). These decisions establish that the

Atomic Energy Act occupied only the field of nuclear safety, and, even in that field, did not preempt an award of punitive damages for conduct related to worker safety.

Goodyear has utterly failed to meet its burden of establishing the requisites for congressional preemption spelled out in this Court's decisions. The Atomic Energy Act contains no explicit language of preemption; in fact, it preserves state authority to regulate non-radiological safety concerns (42 U.S.C. § 2021(k)). The Act does not occupy the field of occupational safety and health at nuclear production facilities. Nor is there any actual conflict between Ohio's worker's compensation scheme and the objectives of the federal nuclear power program.

Still less has Goodyear met the stricter burden of showing federal regulatory preemption of the Ohio law. The DOE regulatory scheme expresses no intent to preclude state safety regulation. On the contrary, DOE has adopted safety standards developed under OSHA, which contains a savings clause for worker's compensation laws. Further, by describing those standard as "minimum" requirements, DOE has implicitly authorized additional safety regulation.

ARGUMENT

I. Congress's Unqualified Authorization To Apply State Worker's Compensation Laws At Federally Owned Facilities Includes Enhanced Awards For Violation Of State Safety Requirements.

The Court may begin and end its analysis of this case with 40 U.S.C. § 290, the federal statute authorizing the enforcement of state worker's compensation laws at federally owned facilities like the Portsmouth plant. It need not reach the constitutional immunity and preemption issues that Goodyear and the Solicitor General have raised because the unqualified congressional authorization for States to apply their "workmen's compensation laws" to such facilities clearly permits Ohio to collect the enhanced award from Goodyear.

Section 290 contains a comprehensive grant of authority to the States to apply their worker's compensation laws to private contractors at federal facilities. In relevant part, the statute provides:

> . . . *States shall have the power and authority to apply* [*their worker's compensation*] *laws to all lands and premises owned or held by the United States of America* by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State, *and to all projects, buildings, constructions, improvements, and property belonging to the United States of America*, which is within the exterior boundaries of any State, *in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State* within whose exterior boundaries such place may be.

(emphasis added).[11] Nothing in the language or the legislative history of Section 290 suggests that Congress intended to authorize States to apply only a part of their worker's compensation laws to federally owned facilities. In fact, the background of the law demonstrates quite the contrary.

Congress had earlier enacted a broad waiver of immunity, authorizing the recovery of damages under state laws by persons injured or killed on federal property. 16 U.S.C. § 457. Although that law did not specifically authorize recovery of worker's compensation, courts at the time generally recognized the right of recovery under state compensation laws for injury or death sustained on federal property. See S. Rep. No. 2294, 74th Cong., 2d Sess. 1 (1936). In 1934, this Court held that 16 U.S.C. § 457 authorized only "actions at law." *Murray*

[11] As the Solicitor General explains (Brief at 20), although the language and legislative history of this statute address federal enclaves over which the United States has assumed exclusive jurisdiction under the United States Constitution (Art. I, § 8, cl. 17), it authorizes *a fortiori* the application of state worker's compensation laws to federal facilities, like the Portsmouth plant, that are not federal enclaves.

v. Gorrick & Co., 291 U.S. 315, 318 (1934). The *Murray* decision left in doubt the applicability of worker's compensation laws to federal projects. See S. Rep. No. 2294, *supra*, at 1. In response, Congress enacted 40 U.S.C. § 290 to clarify 16 U.S.C. § 457 and restore the right of workers on federal property to recover under state compensation laws as they had under previous case law.[12]

The suggestion by Goodyear and the Solicitor General that Section 290 is only a partial grant of authority is simply wrong. Neither the language nor the legislative history of the statute contains any limitation. In fact, because Section 290 was enacted to correct *Murray*'s narrow interpretation of 16 U.S.C. § 457, its language should be broadly construed. *See North Haven Board of Education v. Bell*, 456 U.S. 512, 521 (1982) ("There is no doubt that 'if we are to give [the statute] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" (citation omitted)); *see also Owen v. City of Independence*, 445 U.S. 622, 636 (1980) (remedial legislation is to be liberally and beneficially construed); *Piedmont Northern Ry. v. ICC*, 286 U.S. 299, 311-12 (1932) (same).

[12] See S. Rep. No. 2294, *supra*, at 1. The House Report explained:

> [P]rivate insurance companies with whom compensation insurance has been placed by the contractors have recently discovered two decisions—one by the Supreme Court of the United States and one by the Supreme Court of California—which seem to hold that the State Compensation Insurance Acts do not apply, leaving the workers wholly unprotected, except for their common-law right of action for personal injuries which would necessitate action being brought in the Federal courts. In many cases objection to the jurisdiction of the industrial accident commission has been raised over 1 year after the injury occurred and after the statute of limitations has run against a cause of action for personal injuries. This status of the law has made it possible for the compensation insurance companies to negotiate settlement with the workers on a basis far below what they would ordinarily be entitled. The situation . . . exists throughout the United States wherever work is being performed on Federal property.

H. Rep. No. 2656, 74th Cong., 2d Sess. 2 (1936).

Nor does the legislative history support Goodyear's assertion that Congress was unaware of enhanced compensation provisions or did not understand that authorizing the application of "workmen's compensation laws" would include such provisions (Brief for Appellant at 27; see also Brief for the United States at 22). Congress acts against the backdrop of prevailing rules of law and, if the language or legislative history of a statute says nothing to disavow that context, will be presumed to incorporate it. *See Owen*, 445 U.S. at 637-39. As noted above, enhanced compensation provisions were integral features of several state worker's compensation programs when Congress enacted Section 290.[13] It is not reasonable to assume, on the basis of congressional silence, that provisions like the one at issue here were carved out of the authorization specifically conferred by Section 290.

The attempt to bifurcate the worker's compensation provisions into standard awards, which are concededly authorized, and enhanced awards, which allegedly are not, parallels the contention that the Court rejected decisively in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). There, the Court found that an argument grounded on "the differences between compensatory and punitive damages awards" was misdirected because

[13] The Ohio provision challenged here, for example, has been held by both the state and federal courts to be an integral part of the state worker's compensation law. *See State ex rel. Kroger Co. v. Industrial Comm'n*, 62 Ohio St. 2d 4, 402 N.E.2d 528, 530 (1980); *State ex rel. Bailey v. Krise*, 18 Ohio St. 2d 191, 249 N.E.2d 55, 59 (1969); *State ex rel. Emmich v. Industrial Comm'n*, 148 Ohio 658, 76 N.E.2d 710, 713 (1947). These courts have "the final authority to interpret . . . that State's legislation." *Brown v. Ohio*, 432 U.S. 161, 167 (1977) (citation omitted). *See also Industrial Fabricators, Inc. v. Ohio Industrial Comm'n*, No. C-2-77-119 (S.D. Ohio) (Oct. 3, 1979) (J.A. 109-13) (holding that OSHA's savings clause, 29 U.S.C. § 653(b), for "any workmen's compensation law" preserved Ohio's enhanced compensation provision from preemption because it "forms an integral part of [that] law" (J.A. 113)).

"[p]unitive damages have long been a part of traditional state tort law," and "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted" (*id.* at 255).

The only evidence in the legislative history identified by Goodyear and the Solicitor General as narrowing the broad sweep of Section 290 is the deletion by the Senate of language in the House bill that would have authorized the application of state safety and insurance regulations, as well as worker's compensation laws, to employees on federal projects. See S. Rep. No. 2294, *supra*, at 2. Of course, that deletion affected not at all the express authorization of worker's compensation remedies, and therefore says nothing of Congress's intent regarding the scope of those remedies. In fact, to the extent that the amendment has any relevance at all, it cuts against any intent to limit worker's compensation remedies. The decision to preclude only direct safety regulation confirms that Congress was not concerned about any incidental effects on safety regulation that might flow from the enforcement of state worker's compensation laws.[14]

Strong policy considerations similarly militate against Goodyear's argument that the provisions of state worker's compensation laws should apply only selectively to private contractors operating federal facilities. First, such an interpretation would make a straightforward statute unworkable. Unless Section 290 authorizes application of

[14] This conclusion is reinforced by the special consideration that Congress has shown in other contexts toward state worker's compensation laws. For example, OSHA expressly saves state worker's compensation laws from preemption. 29 U.S.C. § 653(b)(4). Federal law also precludes the removal of state civil actions under worker's compensation laws to federal district courts. 28 U.S.C. § 1445(c).

the entire body of state worker's compensation laws, employees at federal facilities in different States, covered by varied worker's compensation laws, would not know which particular features of their States' laws applied to them. This confusion would generate a needless administrative and judicial burden and ultimately harm the employees whom the compensation laws and Section 290 are designed to protect. It was just this kind of uncertainty about the availability of state worker's compensation remedies, created by the Court's decision in *Murray*, that prompted Congress to enact Section 290.

Second, selective invalidation of enhanced worker's compensation awards would create inequality among workers at federal facilities in different States. Under 16 U.S.C. § 457, workers in States that allow employees to sue in tort for an employer's violation of safety standards (see n.8, *supra*) could recover additional recompense (*see Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984)), while workers in States like Ohio, which use the enhanced compensation remedy, could not. *Amici* respectfully submit that the Court should not allow history to repeat itself.

II. The Immunity Of The United States From Direct State Regulation Is Not Available To A Private Contractor To Resist Payment Of An Enhanced Worker's Compensation Claim Arising From The Contractor's Violation Of A State Safety Standard.

In *amici's* view, because Congress has expressly authorized the application of Ohio's worker's compensation laws to the Portsmouth plant, the Court need not reach the question whether the Constitution would otherwise immunize Goodyear as a private contractor operating a DOE-owned facility. But even if 40 U.S.C. § 290 did not expressly authorize the enhanced compensation award provision, Goodyear would not be immune under the Supremacy Clause.

In *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court held that the Supremacy Clause bars state regulation of federal instrumentalities and property unless congressionally authorized. *See Hancock v. Train*, 426 U.S. 167, 178-79 (1976); *see also EPA v. State Water Resources Control Board*, 426 U.S. 200, 227-28 (1976); *Mayo v. United States*, 319 U.S. 441, 448 (1943); *Ohio v. Thomas*, 173 U.S. 276, 282-84 (1899). Private parties, however, are not immunized from generally applicable state laws simply because they happen to deal with the United States. The distinction between the United States and a private contractor, even one that operates a facility owned and controlled by the government, has been firmly established at least since the Court's decision in *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950).

Hancock v. Train is not to the contrary. *Hancock* held that a State could not impose a permit requirement that would preclude the federal government from operating a nuclear production facility if a permit were not obtained. The Court found it "clear from the record that prohibiting operation of the air contaminant sources for which the State seeks to require permits . . . is tantamount to prohibiting operation of the federal installations on which they are located" (426 U.S. at 180). The Court's concern was not with the regulation of private contractors, but, rather, that Congress did not intend to "subject federal agencies to state permits" (*ibid*). In fact, *Hancock* confirms that congressional authorization is not required for all state regulations that "may touch the activites of the Federal Government" (*id* at 179).[15]

[15] *See also EPA v. State Water Resources Control Bd.*, 426 U.S. 200 (1976) (federal facilities discharging pollutants into state waters must comply with the applicable effluent limitations promulgated by State under Federal Water Pollution Control Act, but need not obtain a discharge permit).

Significantly, neither the majority nor dissenting opinions in the Ohio Supreme Court cited *Hancock v. Train*. Although Goodyear argues at length that the Ohio law "constitutes 'regulation'" of the federal government (Brief at 12; see *id.* at 10-18), reliance on *Hancock* is misplaced. The facts of this case clearly place Goodyear, as a private contractor, outside the zone of Supremacy Clause immunity. Unlike the state laws considered in *Hancock* and its progeny,[16] the Ohio law in question here does not impose a state permit requirement as a precondition to operation of a federal facility or place "a prohibition on the federal government" (426 U.S. at 180).[17] Goodyear is a participating member in the state worker's compensation program; it contributes to the state fund; and it certified an initial payment from the state fund to its employee, Esto Miller. The basis for Miller's additional claim is that his accident resulted from Goodyear's violation of a safety standard on a scaffold whose maintenance was the responsibility of Goodyear, not the federal government. See DOE Contract, Art. III, § 5.c, at p. 6. There is no claim whatever in this case against DOE or any other federal agency. No state agency can force DOE to adopt its safety standard, or shut down the Portsmouth facility because of Goodyear's violations.

It is therefore not surprising that the Solicitor General concedes (Brief at 15) that this case "[does] not involve a regulation imposed directly on the federal government or a regulation enjoining how the 'instrumentalities or

[16] *See, e.g., Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051 (9th Cir. 1985); *Citizens & Landowners Against the Miles City/New Underwood Powerline v. Secretary*, 683 F.2d 1171 (8th Cir. 1982); *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981); *Don't Tear It Down, Inc. v. Pennsylvania Ave. Dev. Corp.*, 642 F.2d 527 (D.C. Cir. 1980); *Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976), *cert. denied*, 430 U.S. 977 (1977).

[17] It is not clear from the record whether Goodyear would be able to pass on the cost of the enhanced award to DOE. See DOE Contract, Art. XIV, at p. 25; Art. XVIII, at pp. 27-28.

property' of the federal government are to be employed." Tracking much of Goodyear's argument, however, the Solicitor General urges that the enhanced compensation provision "should be *treated* as a regulation of a federal-government activity" (Brief at 16) (emphasis added). Both arguments are difficult to follow because they rest upon an erroneous characterization of the enhanced compensation scheme[18] and upon aspects of the law which, although correctly represented, are irrelevant.[19] In any event, the discussion whether the enhanced compensation provision is or is not a "regulation" is immaterial because even if it has some regulatory aspects, it is neither a regulation, nor tantamount to a regulation, of the federal government.[20]

[18] Chief among the errors is the characterization of the enhancement as a penalty. The state and federal courts in Ohio have recognized that it is primarily compensatory in nature. *See State ex. rel. Bailey v. Krise*, 18 Ohio St. 2d 191, 249 N.E.2d at 60 ("We conclude that the primary characteristic of Ohio's additional award for a violation of a specific safety requirement is compensatory, not penal."); *Industrial Fabricators, Inc. v. Ohio Industrial Comm'n*, C-2-77-119 (S.D. Ohio Oct. 3, 1979) (J.A. 112) (the provision "was meant to fully serve the purpose of compensation"). This error is compounded by the plainly incorrect statement that enhancement under the Ohio law "is triggered solely by deficiencies in the employer's conduct" (Brief for the United States at 18). The trigger is not the employer's neglect of a safety standard, but rather an injury warranting compensation. If the employer's conduct is deficient but does not injure anyone, the Ohio law does not touch him.

[19] Among the irrelevancies is the differentiation of the enhanced compensation award from an ordinary tort remedy (which appears to be unchallenged), on the ground that the amount is limited by law, and the conduct defined by the legislature or the Industrial Commission, rather than by common-law standards of care (Brief for the Appellant at 18; Brief for the United States at 19). In this respect, however, the Ohio scheme differs not at all from innumerable statutory commands whose violation gives rise to tort remedies. See W. Prosser & W. Keeton, *The Law of Torts* § 36, at 229-30 (1984) ("Prosser") (violation of a statute is negligence *per se*).

[20] The Solicitor General's suggestion (Brief at 18) that the enhanced compensation is a windfall not measured by the employee's

The enhanced compensation provision is directed against Goodyear, and thus enjoys presumptive validity, subject to challenge only on the basis of a demonstrated conflict with federal law or policy. The appropriate standard, as the Solicitor General suggests, is "akin to that in preemption cases" (Brief at 23); and, as we discuss in Part III, *infra*, the Court has made clear that preemption by implication is not favored.

It is well settled that a private contractor cannot claim implied immunity from the application of a state charge or regulation on the ground that its effect is to impose an increased economic burden on the federal government. In *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261 (1943), this Court upheld the application of Pennsylvania's minimum milk price regulations to a private contractor selling milk to the United States. The milk dealer had sold milk below the state minimum price but at the price stipulated in the contract with the federal government, and the Commonwealth denied the dealer a license. In upholding the denial, the Court made it clear that federal immunity from state regulation does not extend to independent contractors. As the Court stated:

> [I]n the absence of Congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. But those who contract to furnish supplies or render services to the government are not such agencies and do not perform government functions, and the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation.

318 U.S. at 269-70 (citations omitted).

Similarly, the Court has often held that a State may impose a nondiscriminatory state tax on businesses that contract with the federal government.[21] *See, e.g., Alabama v. King & Boozer*, 314 U.S. 1 (1941); *United States v. City of Detroit*, 355 U.S. 466, 469 (1958).[22] Most recently, in *United States v. New Mexico*, 455 U.S. 720 (1982), the Court rejected decisively a claim of immunity by government contractors engaged, like Goodyear, in managing federal property. The Court held that "immunity cannot be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy" (*id.* at 734).

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need must surely be rejected. Worker's compensation programs reflect a tradeoff: the employee is relieved of the obligation to prove fault on the part of the employer, but generally does not receive complete compensation. *See McMunn v. Hertz Equip. Rental Corp.*, 791 F.2d 88, 92 (7th Cir. 1986); Prosser, *supra* n.19, § 80, at 573-74; *see also State ex rel. Bailey v. Krise*, 18 Ohio St. 2d 191, 249 N.E.2d at 59. Thus, it is appropriate in cases where the employer's fault is clear to afford a closer approximation to full compensation for a worker's loss. In this case, Miller, who suffered a broken ankle and missed 29 weeks of work, received a basic award of about $9,000 as recompense for lost wages, medical expenses, and pain and suffering. The maximum enhancement would be about $4,500. See Motion to Dismiss or Affirm at 1 n.1.

[21] DOE's predecessor (the Atomic Energy Commission) had, in fact, made it "possible to arrive at cooperative arrangements with the states" for the "collection and remission of sales taxes" for facilities like the Portsmouth Plant. See J.S. App. 34a-35a; see also DOE Contract, Art. XIV, authorizing payment of taxes, fees, and charges.

[22] These principles were applied more recently in *United States v. Pennsylvania Envtl. Hearing Bd.*, 584 F.2d 1273 (3d Cir. 1978). That case involved the Scranton Army Ammunition Plant, owned by the United States but operated by an independent contractor. For more than two years, the contractor illegally discharged 1.5 million gallons per day of untreated wastes from the plant. *See id.* at 1275. When Pennsylvania sued the contractor seeking civil

The Solicitor General (Brief at 23 n.18) would distinguish this case from *New Mexico* on the ground that this case involves a "regulation" and not a tax.[23] Sovereign immunity is not a shifting concept, to be narrowed when the issue is taxation and widened when it is regulation.[24] The essential question is whether the effect on the federal government is too severe to be borne under our constitutional system, which recognizes not only the supremacy of the federal government but also the sovereignty of the States.

Thus, it is most difficult to understand the criticism leveled at the Ohio safety standard for being "specific"

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penalties for the resulting water pollution, the contractor argued that the Commonwealth lacked jurisdiction to impose fines or penalties upon it "under the doctrine of sovereign immunity." *Id.* at 1276. The Court of Appeals for the Third Circuit rejected this argument because the contractor was not an agency or department of the federal government entitled to immunity. In reaching this conclusion, the Third Circuit observed that *Hancock v. Train* dealt only with the attempt to regulate federal agencies and did not cover private companies contracting with the federal government. *See* 584 F.2d at 1280 n.22.

[23] Although the Solicitor General notes that the Court has not adopted this "rigid rule" to determine the validity of state regulation of federal contractors (Brief at 23 n.18), it may be that the Court has not had before it, since *New Mexico*, a case presenting that issue. The Solicitor General cites no case concerning state regulation in which the Court has rejected the *New Mexico* standard. *Amici* submit that there is no principled distinction between state taxation and state regulation of federal contractors, and that the appropriate standard for reviewing state regulation is found in the *New Mexico* case.

[24] Indeed, an argument can be made that state regulation of a government contractor is *a fortiori* valid if state taxation would be because the burden of state taxes imposed on federal contractors falls inevitably on the federal government. Here, there is some question whether the cost of the enhanced award may be passed through to the federal government. See DOE Contract, Art. XIV, at p. 25; Art. XVIII, at pp. 27-28.

(Brief for the Appellant at 18; Brief for the United States at 19). Its very specificity should enable Goodyear and the federal government to point out readily how the standard interferes with Goodyear's execution of its federal mission. Yet neither has identified any such interference, beyond the mere fact that a state law is applied to a private employer in connection with its performance of a government contract—a fact repeatedly held insufficient to establish the infringement of sovereign immunity.[25]

Nor have they identified any conflict between the state law and federal policy.[26] The hazard in this case was not related to the radiological activities of the nuclear production facility. In the area of workplace safety, as with other safety, health, or environmental regulations, there is nothing unusual about a contractor's compliance with federal, state, and local codes, notwithstanding the ab-

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[25] Goodyear does suggest (Brief at 31) that its operations could be impeded by an Industrial Comission investigation, but not that the investigation in this case (see J.A. 114-19) had any such effect. Accordingly, Goodyear's suggestion need not be considered here. If, in a particular case, an investigation were too disruptive or too intrusive, for example, because of national security concerns, the injured employee might be unable to obtain the evidence necessary to sustain a claim for enhanced compensation.

[26] Such a conflict has been the basis of the Court's holding in the cases relied on by Goodyear (Brief at 30) and the Solicitor General (Brief at 23), where private parties have succeeded in challenging state regulation on immunity grounds. *See United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285 (1963); *Paul v. United States*, 371 U.S. 245 (1963); *California Pub. Util. Comm'n v. United* U.S. 187 (1956). The somewhat elusive standard in these cases *States*, 355 U.S. 534 (1958); *Leslie Miller, Inc. v. Arkansas*, 352 seems inconsistent with this Court's more recent preemption cases. It is certainly inconsistent with the Court's most recent case dealing with the immunity of government contractors from state taxation (*United States v. New Mexico*, 455 U.S. 720 (1982)). This case may provide an opportunity for the Court to clarify the standard for invalidity of state regulation applied to private contractors with the federal government.

stract concern that Goodyear should not have to serve "two regulatory masters" (Brief for Appellant at 45; see Brief for the United States at 26).

Rather, the federal government shares with Ohio a strong concern for employee safety, which is surely not lessened when the workers involved are employees of contractors managing federal property. Indeed, the very standard at issue here is virtually identical with a standard promulgated by the federal government itself. While *amici* do not believe that this identity is necessary to uphold the application of Ohio's enhanced compensation provision, it clearly precludes the argument that its enforcement will interfere with the exercise of any sovereign function of the United States.

III. The Atomic Energy Act Of 1954 Did Not Preempt Application Of A State Provision For Enhancement Of A Worker's Compensation Award When Injury Results From Violation Of A State Safety Standard By An Employer Operating A Nuclear Production Facility.

This Court's decisions in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n* ("*PG&E*"), 461 U.S. 190 (1983), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), appear dispositive of Goodyear's preemption claim.[27] In *PG&E*, the Court held that the Atomic Energy Act did not preempt a state regulation imposing a moratorium on the certification of nuclear power plants pending development and approval of a plan for disposing of nuclear wastes. The Court found that "the Federal Government has occupied the entire field of nuclear safety concerns" (*id.* at 212). Concluding, however, that the state regulation was directed at "economic problems, not radiation

[27] We note that the question of preemption does not arise at all if, as we urge in Parts I and II, *supra*, the enhanced worker's compensation provision is not a safety regulation at all.

hazards" (*id.* at 213), the Court upheld the statute because it was "outside the occupied field of nuclear safety regulation" (*id.* at 216). In *Silkwood*, the Court held that "the pre-empted field does not extend as far" as an award of punitive damages, even for conduct related to radiation hazards (464 U.S. at 249). The Court ruled (*id.* at 256):

> [I]nsofar as damages for radiation injuries are concerned, pre-emption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.

Certain attempted distinctions between this case and the *PG&E* and *Silkwood* cases may be readily put aside. That this case involves a private party operating a federally owned nuclear production facility, rather than a nuclear power plant, as in *PG&E*, or a licensed nuclear facility, as in *Silkwood*, may conceivably have some relevance to Goodyear's claim of sovereign immunity (see Part II, *supra*); but it does not, in and of itself, afford a basis for preemption. Further, as we have shown in Part I, there is no meaningful difference between a tort remedy, like the one involved in *Silkwood*, and Ohio's enhanced worker's compensation award. Both provide a remedy to workers for injury attributable to neglect or fault on the part of the employer. Thus, *Silkwood*, which upheld a tort remedy for injury caused by radiological hazards, would clearly preserve a tort remedy for harm resulting from non-radiological hazards. Simply because Ohio, like eleven other States, has chosen an enhanced worker's compensation award rather than the tort remedy provided by other States, does not afford a basis for preemption. Only if there is something in the

Atomic Energy Act itself that requires different treatment of state regulation of non-radiological hazards at nuclear production facilities can Goodyear prevail on its preemption challenge.[28]

A brief review of preemption principles may be helpful. Congress may expressly preempt state law by including preemption language in a statute. *See California Federal Savings & Loan Ass'n v. Guerra*, 107 S.Ct. 683, 689 (1987) (*CalFed*); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Congress may impliedly preempt state law by demonstrating an intent to "occupy a given field." *California Coastal Comm'n v. Granite Rock Co.*, 107 S.Ct. 1419, 1425 (1987); *see Silkwood*, 464 U.S. at 248. Congressional intent to occupy a given field can be determined from the pervasiveness of the federal regulatory scheme, the dominance of the federal interest, or the goals of, and obligations imposed by, the federal statute. *See Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982). As the Court said last Term, it "must be guided by the goals and policies of the Act in determining whether it in fact preempts an action based on the law of an affected State." *International Paper Co. v. Ouellette*, 107 S.Ct. 805, 812 (1987).

Where Congress has not evidenced an intent to occupy a given field, federal law may preempt state law to the extent of any actual conflict between the two. *See California Coastal Comm'n*, 107 S.Ct. at 1425; *CalFed*, 107 S.Ct. at 689; *Silkwood*, 464 U.S. at 248. Such conflicts occur when compliance with state law precludes compliance with federal law or interferes with the accomplishment of congressional objectives. *See International Paper*, 107 S.Ct. at 812; *CalFed*, 107 S.Ct. at 689; *Silkwood*, 464 U.S. at 248.

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[28] The Solicitor General does not make an argument that the enhanced compensation provision is preempted by the Atomic Energy Act. See Brief for the United States at 12 n.10, 13 n.11.

State laws may be preempted by federal regulation as well as by federal statutes (*see Fidelity Federal*, 458 at 153-54), but the applicable standards for implied preemption are considerably more stringent. *See Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716-17 (1985) (refusing to find implied preemption of state law based on federal agency regulation).

Preemption is not to be "lightly infer[red]." *International Paper*, 107 S.Ct. at 811. In particular, there is a "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause" (*Hillsborough County*, 471 U.S. at 716); and the Court has been reluctant to find federal preemption of state health and safety laws, a traditional area of legitimate state concern.[29] Thus, Goodyear bears a heavy burden to show that Congress intended to preclude a state remedy. *See Silkwood*, 464 U.S. at 255, *citing Electrical Workers v. Foust*, 442 U.S. 42, 53 (1979) (Blackmun, J., concurring). Goodyear has not shown that this case falls within any of the limited categories of preemption.

1. *Express Preemption.* The Atomic Energy Act of 1954 contains no express preemption of state safety regulation for non-radiological hazards or state worker's compensation programs; in fact, it "contains no preemption provision whatever." *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 628 (1st Cir. 1987). *See PG&E*, 461 U.S. at 204-05 (discussing implied preemption because the Atomic Energy Act contains no express prohibition).

2. *Occupation of a Regulatory Field.* Nor can Goodyear sustain its burden of proving that state safety regu-

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[29] *See, e.g., Hillsborough County*; *Brotherhood of Locomotive Engineers v. Chicago, R.I. & P. R.R.*, 382 U.S. 423 (1966); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Terminal R.R. Ass'n v. Brotherhood of R.R. Trainmen*, 318 U.S. 1 (1943).

lation at a nuclear production facility is precluded by a pervasive federal statute occupying the field of regulation. Goodyear relies primarily on 42 U.S.C. § 2061, as "clearly indicat[ing] that Congress intended DOE . . . to have exclusive regulatory authority over the operation of federally owned nuclear production facilities" (Brief at 38-39). Section 2061 provides for exclusive federal ownership of certain nuclear production facilities (*id.* § 2061 (a)) and federal responsibility to produce or provide for the production of special nuclear material in those facilities (*id.* § 2061(b)). DOE is authorized to enter into contracts with private parties to produce special nuclear material at federal facilities (*ibid*). The contract must require the contractor "to comply with all safety and security regulations *which may be prescribed*" by DOE (*id.* § 2061(b)(2)(C) (emphasis added)).

This is not the language of preemption. It plainly does not express an intent on the part of the Congress to displace the States from their traditional responsibility for worker safety. It does not even suggest that the contractor's responsibility to comply with any nuclear safety regulation that DOE may promulgate precludes its obligation to abide by state worker's compensation laws.

In fact, another section of the Atomic Energy Act demonstrates that Congress intended to preserve state authority. Title 42 U.S.C. § 2021(k) provides: "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."

Goodyear argues that Section 2021(k) does not apply to nuclear production facilities like the Portsmouth plant. It bases this argument on the provisions of two other subsections of Section 2021. Subsection (b) authorizes DOE to enter into agreements with the States to allow them to assume regulatory authority over certain nuclear

activities, and authorizes those States "to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards." The scope of such agreements is limited by subsection (c), which requires DOE to retain its authority over and responsibility for regulating nuclear production facilities like the Portsmouth plant.

Goodyear argues that subsection (c)'s exclusion of nuclear production facilities from the cooperative agreements authorized by subsection (b) also excludes them from subsection (k)'s preservation of state authority to impose non-radiological safety regulation; in other words, that subsection (k) applies only to activities that fall within subsection (b), and not to nuclear production facilities that fall within subsection (c). The short answer to this is that subsection (k) is not so restricted; it states, unambiguously, that "[n]othing in this section"—*i.e.*, all of Section 2021, including subsection (c)—shall be construed as affecting non-radiological state regulation.[30]

Not only does the plain language of Section 2021(k) preclude Goodyear's interpretation, but it must also be rejected because it would render subsection (k) meaningless. First, because subsection (k) is phrased as a savings clause, it would make no sense if it applied only to subsection (b) and not to subsection (c). Subsection (b), which contains a *grant* of authority, needs no savings clause. It is only because subsection (c) contains a *re-*

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[30] In *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1150 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972), the court explained (emphasis added):

> The only logically acceptable reason for inclusion of subsection (k) within § 2021 was to make it clear that Congress was not, by subsection (c) . . . , in any way further limiting the power of the states to regulate activities, *other than radiation hazard*, associated with those areas over which the [DOE] was forbidden by that subsection to relinquish its control.

striction on state authority that a savings clause might have been thought to be necessary. Second, if Congress intended subsection (k) to authorize non-radiological regulation with respect to those activities for which radiological regulation is authorized by subsection (b), it is not readily apparent why Congress enacted separate subsection (k), rather than authorize *both* radiological and non-radiological safety regulation in subsection (b). Third, the cession of authority to the States in subsection (b) to regulate the radiological hazards of certain activities would appear to imply the authority to regulate non-radiological hazards of the same activities. Subsection (k) would seem superfluous if it authorized nothing else.[31]

3. *Conflict with federal law.* Goodyear has also failed to show that state safety regulation at a nuclear production facility precludes accomplishment of the federal purposes of the Atomic Energy Act. The "additional costs" engendered by the enhanced compensation award provision (Brief at 45) pale in comparison with the punitive damages sanctioned in *Silkwood*; indeed, they are at most 50% of the basic worker's compensation

[31] Indeed, it could be argued that, if subsection (k) applies only to subsection (b), a savings clause would not have been necessary because there would have been nothing to preempt non-radiological regulation in the first place. As the Court noted in *PG&E*, "Congress made clear that [subsection (k)] was not intended to cut back on *pre-existing* state authority" (461 U.S. at 209) (emphasis added). *See also id.* at 210 n.22 (federal " 'regulatory control was limited to considerations involving the common defense and security and the protection of the health and safety of the public with respect to the special hazards associated with the operation of nuclear facilities' ") (citing H.R. Rep. No. 567, 89th Cong., 1st Sess. 4 (1965)). Thus, Goodyear can derive no comfort from the statement in *PG&E* that subsection (k) "does not represent an affirmative grant of power to the States" (461 U.S. at 210). The question is what has *displaced* the States' traditional authority over non-radiological safety.

award. Any complaint about "another, different layer" of health and safety regulation (*ibid.*) is irrelevant here because the safety standard involved in this case is virtually identical to the DOE standard. Finally, there is simply no showing to support the suggestion that state regulation may result in the disclosure of important national security information (*id.* at 48).[32]

4. *Regulatory preemption.* Finally, Goodyear's reliance on DOE's "pervasive and comprehensive regulatory system" (Brief at 42) as occupying the regulatory field is also plainly insufficient. "[I]f an agency does not speak to the question of pre-emption, [the Court] will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt." *Hillsborough County*, 471 U.S. at 718. DOE's regulations are no more pervasive and comprehensive than the Federal Drug Administration's blood plasma regulations, which were found insufficient in *Hillsborough County* to preempt local health and safety regulation.[33] In fact, DOE's regulation of non-radiological safety consists simply of incorporation by reference of standards developed under OSHA;[34] and the DOE orders not only contain no expression of an intent to preempt state law, but they describe the incorporated OSHA standards as "minimum" safety requirements. See DOE Order No. 5481.1B, Ch. I, § 1(a) (Sept. 23, 1986).

[32] Significantly, the Solicitor General does not argue that state regulation presents a threat to national security.

[33] Goodyear wisely does not argue that the enhanced compensation award or the state safety standard upon which it is based actually conflicts with any DOE regulation. *See Hillsborough County*, 471 U.S. at 721.

[34] OSHA contains an express savings clause for worker's compensation remedies. 29 U.S.C. § 653(b)(4). No reason appears why DOE's reference to that statute and adoption of the safety standards developed under OSHA is not sufficient also to incorporate that savings clause. See DOE Order No. 5483.1, § 1(a) (April 13, 1979).

In short, there is nothing in the Atomic Energy Act or in DOE's implementing regulations that would preempt Ohio's enhanced award provision or restrict the broad authorization of 40 U.S.C. § 290 for the application of that provision as an integral part of the State's worker's compensation law.

CONCLUSION

The judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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